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Conditions of Work and Employment Programme

***Sexual harassment at work:  
National and international responses***

**Deirdre McCann**

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## Preface

Sexual harassment is a hazard encountered in workplaces across the world that reduces the quality of working life, jeopardizes the well-being of women and men, undermines gender equality and imposes costs on firms and organizations. For the International Labour Organization, workplace sexual harassment is a barrier towards its primary goal of promoting decent working conditions for all workers.

This report contributes to the ILO's activities in this area by providing an overview of what is being done to prevent and combat workplace sexual harassment at international level and in countries across the world. It reviews international standards and national legislation; the activities of governments, employers' and workers' organizations, and NGOs; and workplace policies and programmes. The report does not provide an exhaustive account of these measures, but instead attempts to identify the main approaches being taken, to highlight dominant trends and to single out best practices.

It finds that in countries in which research has been conducted, workplace sexual harassment is relatively widespread. Moreover, although it has male victims, sexual harassment is overwhelmingly directed at women, especially those in less-powerful positions in the labour market. It has also become apparent that it can impose substantial costs on both its victims and their employers.

The report shows that sexual harassment has been the subject of a broad range of measures since the late 1970s. At the international level, it has been addressed as both an aspect of gender discrimination and as a form of violence against women. Governments in all regions have enacted legislation to prohibit it, mainly over the period since 1995. In this regard, the report identifies signs of an emerging trend towards enacting specific laws against sexual harassment which draw on both civil and criminal law approaches; of imposing duties on employers and holding them liable for the actions of their employees, and of tailoring enforcement procedures so that they do not discourage individuals from bringing claims. The role of laws in encouraging employers to introduce workplace policies is also increasingly influencing their content.

In addition to legal measures, many governments, employers' and workers' organizations, and other bodies are using a range of techniques to prevent sexual harassment and help its victims. It is common, for example, for governments to issue guidance on how to design anti-sexual harassment measures and to offer counselling to workers who have been targeted. Workers' and employers' organizations are producing model policies and collective agreement clauses, issuing guidance on complying with laws, conducting research and providing training. At the workplace level, growing numbers of employers are introducing sexual harassment policies and complaints procedures, particularly in industrialized countries; and there are signs of awareness of the need for these policies in a number of countries in which they have, until now, been relatively rare. Moreover, there appears to be an emerging consensus around what workplace policies should contain and the steps to be taken to implement them, which can be drawn on by those employers who have yet to take action.



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The report is part of a broader research effort on workplace violence and harassment being conducted by the ILO's Conditions of Work and Employment Programme (TRAVAIL) ([www.ilo.org/travail/harassment](http://www.ilo.org/travail/harassment)). By providing information on current trends in preventing and addressing workplace sexual harassment, it is intended to offer some indication of what has been achieved and what remains to be done to address this problem. It is hoped that the report can be used by governments, workers, employers and other organizations committed to taking action to prevent sexual harassment at work.

François Eyraud,  
Director,  
Conditions of Work and Employment Programme,  
Social Protection Sector.

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# I. Defining sexual harassment

## Introduction

Over the last decade, there has been a growing awareness worldwide of the existence and extent of sexual harassment in the workplace. Governments, employers' and workers' organizations in both industrialized and developing countries have introduced a range of laws, policies and procedures aimed at preventing and combating it. Given this proliferation of measures designed to prevent sexual harassment, it is useful to review their development and consider the range of issues encountered in designing them, as an aid to identifying the most effective ways to combat harassment at the workplace, national and international levels. The following chapters review the advances made at the international and regional levels (Chapter II); national laws (Chapter III); the range of actions being taken by governments, the social partners and non-government organizations (Chapter IV); and workplace policies and procedures (Chapter V). This chapter sets the scene for those discussions by examining the nature of sexual harassment, the ways in which it is being defined, and its significance to both the workers it affects and the organizations in which it takes place.

## International recognition of sexual harassment

Women have long been exposed to workplace harassment which involves conduct of a sexual nature or is premised on the sex of the victim. These kinds of behaviour were not given a name, however, until the 1970s, when women in the United States demanded that sexual harassment be recognized as sex discrimination under the federal anti-discrimination legislation.<sup>1</sup> The designation "sexual harassment" has since been adopted by women in many other countries who have used it to characterize their experiences, ensure recognition of these forms of conduct and seek to have them prevented. During the last two decades, legislation, court decisions, awareness-raising initiatives, and workplace programmes and policies have recognized and responded to the problem. In the last decade in particular, advances have been made in both industrialized and developing countries, including in those in which there had previously been little public recognition of the problem.<sup>2</sup> At international level too, sexual harassment has been recognized and addressed by a number of bodies, including the International Labour Organization.<sup>3</sup>

Views on sexual harassment have evolved since it was a widely tolerated aspect of working life, often considered an occupational hazard which women should expect to endure. The influx of large numbers of women into the paid labour force over the last 20 years and their increasing involvement in worker's organizations and women's advocacy groups have heightened awareness of the extent and destructive consequences of sexual harassment. Women have exposed it as offensive and damaging, redefining the behaviour

<sup>1</sup> See C.A. MacKinnon: *The sexual harassment of working women* (New Haven, Yale University Press, 1979).

<sup>2</sup> See, for example, ILO Regional Office for Asia and the Pacific: *Towards gender equality in the world of work in Asia and the Pacific*, technical report for discussion at the Asian Regional Consultation on Follow-up to the Fourth Conference on Women, Manila, 6-8 October 1999 (Bangkok, 1999).

<sup>3</sup> See Chapter II.

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deemed an inescapable fact of workplace life as a manifestation of sex discrimination and a form of violence.

## The range of harassing behaviour

A variety of behaviour is designated as sexual harassment in the different measures which proscribe it. These range from some of the most egregious behaviour prohibited by the criminal law — rape, sexual assault — to conduct which can, in certain circumstances, be an innocuous part of day-to-day interaction — comments, jokes, physical contact. The kinds of conduct characterized as sexual harassment in the measures reviewed in Chapters II to V of this paper can be categorized as physical, verbal and non-verbal conduct.<sup>4</sup> Each category encompasses a wide range of actions, some of which are illustrated below.

Examples of sexual harassment	
<b>Physical conduct</b>	
	<ul style="list-style-type: none"><li>• Physical violence</li><li>• Physical contact, e.g. touching, pinching</li><li>• The use of job-related threats or rewards to solicit sexual favours</li></ul>
<b>Verbal conduct</b>	
	<ul style="list-style-type: none"><li>• Comments on a worker's appearance, age, private life, etc.</li><li>• Sexual comments, stories and jokes</li><li>• Sexual advances</li><li>• Repeated social invitations</li><li>• Insults based on the sex of the worker</li><li>• Condescending or paternalistic remarks</li></ul>
<b>Non-verbal conduct</b>	
	<ul style="list-style-type: none"><li>• Display of sexually explicit or suggestive material</li><li>• Sexually-suggestive gestures</li><li>• Whistling</li></ul>
Source: M. Rubenstein: "Dealing with sexual harassment at work: The experience of industrialised countries", in <i>Conditions of Work Digest: Combating sexual harassment at work</i> , Vol. 11, No. 1, 1992, p. 11.	

Certain of these kinds of behaviour are inherently offensive: those involving physical violence or verbal aggression are the most obvious examples. But others mentioned above could, depending on the circumstances, be entirely harmless. Physical contact, for example, may be strongly objected to, tolerated or encouraged; jokes offensive to one person may be appreciated by another; the same comment may be welcomed, tolerated, or considered offensive depending on the relationship between the individuals involved, the context in which it was made, or even the tone in which it was delivered. Additionally, the kinds of behaviour considered sexually harassing appear to vary among different cultures.<sup>5</sup>

<sup>4</sup> M. Rubenstein: "Dealing with sexual harassment at work: The experience of industrialised countries", in *Conditions of Work Digest: Combating sexual harassment at work*, Vol. 11, No. 1, 1992, p. 11.

<sup>5</sup> See J.B. Pryor, E.R. DeSouza, J. Fitness, C. Hutz, M. Kumpf, K. Lubbert, O. Pesonen and M.W. Erber: "Gender difference in the interpretation of social-sexual behaviour: A cross-cultural

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The degree of physical contact tolerated between colleagues, for instance, may be more extensive in some cultures than others, while the range of topics considered appropriate to discuss in the workplace may also differ. It may, then, be neither possible nor desirable to draw up a comprehensive list of the range of behaviour which can be considered to be sexual harassment. Governments, employers' and workers' organizations, and other groups have been faced with the challenge of finding a way in which to identify sexual harassment when the conduct it covers may be unobjectionable in some circumstances and harmful in others. The most widely accepted solution, as the review of measures and policies in later chapters will illustrate, is to avoid specifying prohibited conduct by adopting definitions based on whether the conduct in question is unreasonable and unwelcome to its recipient.

## **Sexual harassment as unwelcome and unreasonable conduct**

On the one hand, there is conduct which can be regarded as offensive by its very nature, such as physical molestation. On the other hand, a person's reaction to behaviour cannot be entirely unreasonable. But within these broad objective parameters, sexual harassment is essentially a subjective concept: it is for each individual to decide what does and what does not offend them. Any other standard would amount to an intolerable infringement of individual autonomy.

Source: M. Rubenstein, op. cit.

Defining sexual harassment as conduct which is unwelcome to its recipient allows a distinction to be drawn between inoffensive and unacceptable behaviour according to the context in which it takes place. The justification usually offered for adopting this "unwelcomeness standard" is that it permits consensual sexual behaviour while prohibiting workplace mistreatment. It also allows employees the freedom to delineate the boundaries of the behaviour they will tolerate while preventing harassers from evading liability by claiming not to have intended any harm. Two objective limitations are, however, generally imposed on this subjective definition of sexual harassment. First, harassment which takes the form of inherently offensive conduct — physical violence, for example, or sexual blackmail — is usually banned outright and incurs severe penalties. The victim is not required to demonstrate that the behaviour is unwelcome and there is no question that it constitutes sexual harassment. The second limitation relates to behaviour which is inherently innocuous. It requires that this conduct should not be treated as sexual harassment, even if the recipient experiences it as offensive. Introducing this second limitation protects alleged harassers from being held responsible for behaviour which they could not have been expected to realize would be considered a form of harassment. To counter this risk, many measures aimed at preventing harassment demand that the element of judgement exercised by the recipient accord with standards of reasonableness.

Sexual harassment, then, is viewed as a subjective concept subject to objective limitations, as noted by Michael Rubenstein in the above quote. The definitions of harassment discussed in the following chapters, although not always identical, generally draw on this understanding of sexual harassment. Although the precise behaviour captured by the definitions is open to interpretation and may vary according to the cultural context, it will be both unreasonable and unwelcome. Indeed, the flexibility of this definition of

perspective on sexual harassment", in *Journal of Cross-Cultural Psychology*, Vol. 28, 1997, p. 509 [exploring gender differences in perceptions of sexual harassment in Australia, Brazil, Germany and the United States].

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sexual harassment, which allows it to respond to the cultural context in which it is used, can be viewed as one of its primary strengths.<sup>6</sup>

## **The extent and significance of sexual harassment**

### ***The incidence of sexual harassment***

As awareness of sexual harassment in the workplace has intensified, it has become clear that the problem is relatively widespread, even in countries in which it had until recently been widely ignored. Research has exposed its pervasiveness,<sup>7</sup> while legal cases have exposed the details of specific instances of harassment.<sup>8</sup> Initially, few studies or cases emerged from developing countries. During the last decade, however, as it has become increasingly accepted that sexual harassment cannot be considered a problem confined to industrialized countries, research has been conducted and preventive measures developed in countries across a range of economic and cultural conditions.<sup>9</sup>

#### **Harassment of women**

The available research indicates that the vast majority of workers subjected to sexual harassment are women.<sup>10</sup> However, these findings demonstrate that harassment does not impact on women in a uniform way, but is more prevalent against the more vulnerable.

<sup>6</sup> C. Thomas: *Introduction to international perspectives on sexual harassment*, unpublished paper presented to the Caribbean Sub-Regional Seminar on Recent Trends in Employment Equality Issues for Labour Courts and Tribunals, Port-of-Spain (Trinidad), 4-8 October 1999, p. 5.

<sup>7</sup> For the results of recent surveys, see D. Chappell and V. Di Martino: *Violence at work* (2<sup>nd</sup> edition) (Geneva, ILO, 2000), pp. 25-31 [on the 1996 International Crime Victim Survey]; D. Crocker and V. Kalember: "The incidence and impact of women's experiences of sexual harassment in Canadian workplaces", in *Canadian Review of Sociology and Anthropology*, Vol. 36, 1999, p. 541 [on the Canadian Survey on Sexual Harassment in Public Places and at Work]; European Commission: *Sexual harassment at the workplace in the European Union* (Luxembourg, Office for Official Publications of the European Communities, 1999); V. Di Martino, H. Hoel and C.L. Cooper: *Preventing violence and harassment in the workplace* (Dublin, European Foundation for the Improvement of Living and Working Conditions, 2003); US Merit Systems Protection Board: *Sexual harassment in the federal workplace: Trends, progress, continuing challenges* (Washington, DC, US Government Printing Office, 1995).

<sup>8</sup> See, for example, J. Aeberhard-Hodges: "Sexual harassment in employment: Recent judicial and arbitral trends", in *International Labour Review*, Vol. 135, 1996, p. 499.

<sup>9</sup> See, for example, C. Tang: "Sexual harassment: The dual status of and discrimination against female migrant workers in urban areas", in *Social Sciences in China*, Vol. XIX, 1998, p. 64; Aeberhard-Hodges, *ibid.*, note 10; ILO Regional Office for Asia and the Pacific, *op. cit.*, note 2, pp. 47-48; and ILO: *Tripartite Regional Seminar on Combating Sexual Harassment at Work: Proceedings (Manila, 22-26 November 1993)* (Geneva, 1993). See also S. Huda: "Study on sexual harassment in Bangladesh"; The Lawyers Collective: "Sexual harassment at the workplace"; C. Tang: "Report on sexual harassment in workplaces in China"; K. Wijayatilake and F. Zackariya: "Sexual harassment at work: Sri Lanka study, with focus on the plantation sector"; and R. Yamakawa: "Prevention and remedies regarding sexual harassment in Japan", unpublished reports commissioned for the ILO Regional Tripartite Seminar on Action against Sexual Harassment at Work in Asia and the Pacific, Penang, (Malaysia), 2-4 October 2001.

<sup>10</sup> Chappell and Di Martino, *op. cit.*, p. 33, citing European Foundation for the Improvement of Living and Working Conditions data; European Commission, *op. cit.*; Di Martino, Hoel and Cooper, *op. cit.*, pp. 27-30; US Merit Systems Protection Board, *op. cit.*

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Findings point towards those who are financially dependent being at most risk. Young workers, for example, are common targets.<sup>11</sup> Other groups which have been found to be disproportionately subjected to sexual harassment are the single, separated, widowed and divorced.<sup>12</sup> It is also apparent that the kind of workplace in which a woman is employed is a significant factor in the likelihood of her being harassed. Women in non-traditional jobs and predominantly male environments and women who work for male supervisors have been found to be more likely to be subjected to harassment.<sup>13</sup> In developing countries, casual workers and informal sector workers appear to be particularly subject to harassment.<sup>14</sup> And in both developing and industrialized countries, migrant workers have been identified as particularly at risk due to the obstacles they face in securing alternative employment, their social isolation, and their lack of language skills and financial resources.<sup>15</sup> These factors are exacerbated in some countries by government-imposed restrictions on the mobility of migrant workers.

## Harassment of men

Although most victims of sexual harassment are women, there is a growing awareness that men can be victimized in similar ways. Reports of men being subject to harassment, and the number of complaints and legal actions brought by them, have increased in recent years. Again, it has been suggested that the most vulnerable groups in the labour force are targeted: young men, gay men, members of ethnic or racial minorities, and men working in female-dominated work groups.<sup>16</sup> In response, preventive measures have been adapted to counter harassment of men and same-sex harassment.

## **The costs of sexual harassment**

The effects of sexual harassment on its victims are well documented. Studies routinely confirm that most are upset by it, and that many experience feelings ranging from irritation and nervousness to anger, powerlessness and humiliation.<sup>17</sup> At its worst, sexual harassment can make their working lives miserable and even dangerous. Research has shown that victims can eventually become ill when subjected to sexual harassment on a regular basis; particularly where it is perpetrated by a supervisor, involves sexual coercion,

<sup>11</sup> See, for example, the findings of the 1996 International Crime Victim Survey, reported in Chappell and Di Martino, *op. cit.*, pp. 26, 28 and 33.

<sup>12</sup> European Commission, *op. cit.*, pp. 6, 169-170.

<sup>13</sup> *ibid.*, pp. 169-171.

<sup>14</sup> United Nations Commission on Human Rights: *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy*, 53<sup>rd</sup> session, 12 February 1997, Section V, document no. E/CN.4/1997/47. The report draws on L.L. Lim and N. Oishi: *International labour migration of Asian women: Distinctive characteristics and policy concerns* (Geneva, ILO, 1996). See also Tang, *op. cit.* [on the sexual harassment of migrant workers in China]; and ILO Regional Office for Asia and the Pacific, *op. cit.*, note 11.

<sup>15</sup> United Nations Commission on Human Rights, *ibid.*, note 19.

<sup>16</sup> Rubenstein, *op. cit.*, note 4, p. 8.

<sup>17</sup> See, for example, Crocker and Kalember, *op. cit.*, note 9; P.H. Loy and L.P. Steward: "The extent and effects of the sexual harassment of working women", in *Sociological Focus*, Vol. 17, 1984, p. 31.

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or takes place over a long period of time or in a male-dominated setting.<sup>18</sup> It has been found to trigger a wide range of ailments, including stress-related illnesses, high blood pressure and depression. Ultimately, victims of sexual harassment may miss out on career opportunities or leave their jobs.

Sexual harassment also costs employers. When harassed workers lose concentration, when it interferes with their judgement, when they are difficult to motivate or tend to be late or absent, employers incur significant losses.<sup>19</sup> In a recent Canadian survey, for example, nearly one-third of victims reported that their jobs had been affected by sexual harassment.<sup>20</sup> In these circumstances, productivity may decrease, team work be jeopardized, and the risk of workplace accidents increase. Ultimately, employers may lose valuable workers, while others may be dissuaded from applying for vacancies. Employers who fail to prevent sexual harassment may also face the financial costs of sick pay for employees who become ill, and legal bills from court actions brought against them.<sup>21</sup>

In addition, where sexual harassment causes disproportionate numbers of women to feel unwelcome, uncomfortable or threatened in their places of work, or even forced to leave their jobs, it functions as a form of sex discrimination. Allowing it to continue risks many women being reluctant to take up traditionally male jobs or jobs in a largely male workforce. Women's equal opportunities are threatened and their position in the labour force undermined when they are dissuaded from applying for higher-status, well-paid, traditionally male jobs. For these reasons, sexual harassment has been approached as a form of sex discrimination by emphasizing its discriminatory effects and prohibiting it in anti-discrimination laws and policies.

## Conclusion

Characterizing the offensive treatment they encountered at work as "sexual harassment" has enabled women to push to have it recognized as a facet of workplace discrimination and to campaign for measures to proscribe it. Since it was first named in the 1970s, workplace sexual harassment has increasingly been the subject of legal measures, awareness campaigns and workplace policies in countries across the world. Through these initiatives, there has developed a broad consensus around how this kind of treatment should be defined: it is usually identified as sex-based or sexual behaviour unwelcome to

<sup>18</sup> R.A. Thacker and S.F. Gohmann: "Emotional and psychological consequences of sexual harassment: A descriptive study", in *Journal of Psychology*, Vol. 130, 1996, p. 429, cited in Crocker and Kalembra, op. cit., note 9.

<sup>19</sup> On absenteeism, see L.F. Fitzgerald, S. Swan and V.J. Magley: "But was it really sexual harassment? Legal, behavioural and psychological definitions of the workplace victimization of women", in W. O'Donohue (ed.): *Sexual harassment: Theory, research and treatment* (Needham Heights, MA, Allyn and Bacon, 1996), pp. 5-28, cited in Crocker and Kalembra, op. cit., note 9; K. Kauppinen-Toropainen and J.E. Gruber: "Antecedents and outcomes of woman unfriendly experiences: A study of Scandinavian, former Soviet and American women", in *Psychology of Women Quarterly*, Vol. 17, 1993, p. 431; K.T. Schneider, S. Swan and L.F. Fitzgerald: "Job related and psychological effects of sexual harassment in the workplace: Empirical evidence from two organizations", in *Journal of Applied Psychology*, Vol. 82, 1997, p. 401; M.S. Stockdale: *Sexual harassment in the workplace* (Newbury Park, CA, Sage, 1996).

<sup>20</sup> Crocker and Kalembra, op. cit., note 9.

<sup>21</sup> Rubenstein, op. cit., note 4, p. 9. A study by the US Merit System Protection Board estimated that sexual harassment cost the American federal government \$327 million over a two-year period: US Merit System Protection Board, op. cit., note 9.

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its recipient. The research conducted on its extent and dynamics has confirmed that workplace sexual harassment, although it has male victims, is overwhelmingly directed at women. Moreover, it appears to be more often encountered by those who are in a less-powerful labour market position, including young workers, domestic workers, women in non-traditional jobs, migrant workers and women in the informal sector. It is also apparent that sexual harassment imposes heavy costs on both its victims and their employers.





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## II. Combating sexual harassment at the regional and international levels

A range of initiatives to combat workplace sexual harassment have been devised at the regional and international levels, including by the International Labour Organization. In line with the other measures, these have tended to conceptualize sexual harassment as a form of sex discrimination and a manifestation of violence against women. This chapter reviews the measures which have been developed to address sexual harassment at the regional and international levels, culminating in a discussion of the work of the ILO.

### Regional level

#### *Caribbean Community*

The Caribbean Community (CARICOM) issued model legislation on sexual harassment in 1991. The model Protection against Sexual Harassment Act formed part of a broader project on the part of the Community to draft model laws on issues affecting women, which would be available to assist CARICOM Member States in crafting national legislation. The model Act prohibits sexual harassment in the workplace, as well as in education and accommodation, and includes provisions which would empower officers to conduct investigations and establish a tribunal to hear complaints.

#### *European Union*

Within the European Union, concern over sexual harassment in the workplace was first expressed in 1986, when it was addressed in the European Parliament's Resolution on violence against women.<sup>22</sup> The following year, a European Commission report concluded that none of the then 12 Member States had adequate legal mechanisms in place to combat harassment, and called for an EU Directive.<sup>23</sup> Until recently, however, the most significant EU initiative was the 1991 Commission Recommendation and its accompanying Code of Practice. The Recommendation on the protection of the dignity of women and men at work called upon Member States to take action to promote awareness of sexual harassment and to implement the measures outlined in the Code of Practice.<sup>24</sup> Its definition of sexual harassment, which describes it as "unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work", has been highly influential across a number of Member States. In 1996, the Commission issued a second report on national legislation on sexual harassment, which concluded that the Recommendation and Code of Practice had not initiated sufficient progress. It subsequently proposed that the European-level social partners negotiate a collective agreement to be given legal effect as a

<sup>22</sup> "Resolution of 11 June 1986 on violence against women", in *Official Journal of the European Communities*, No. C176, 14 July 1986, p. 79. The Resolution called on the Commission to study the cost to both Member States and the Council of harmonizing national legislation; suggest methods of preventing violence against women; and call for protection and help for its victims.

<sup>23</sup> M. Rubenstein: *The dignity of women at work: A report on the problem of sexual harassment in the Member States of the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1988).

<sup>24</sup> *Official Journal of the European Communities*, Vol. 35, No. L49, 24 February 1992, Annex, pp. 3-5.

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Directive. Following a further report on sexual harassment in 1999,<sup>25</sup> the Commission resumed its quest for a binding instrument by issuing a draft Directive to revise the Equal Treatment Directive.<sup>26</sup> This draft was adopted in September 2002. As a result, the revised Directive draws a distinction between sex-based and sexual conduct, termed “harassment”,<sup>27</sup> and “sexual harassment”,<sup>28</sup> identifying both as forms of discrimination on grounds of sex and prohibiting them.<sup>29</sup>

## **Organization of American States**

Within the Organization of American States, in contrast to the EU, sexual harassment has been conceptualized primarily as a manifestation of violence against women, rather than as a form of sex discrimination. The Inter-American Convention on Violence Against Women (the Convention of Belem do Para), adopted in 1995, defines violence against women as including sexual harassment in the workplace. The Convention affirms the right of women to be free from violence, and imposes a number of duties on the States to promote and protect that right. The States condemn all forms of violence against women and agree to pursue policies to prevent, punish and eradicate it “by all appropriate means and without delay”. In addition, they agree to refrain from engaging in violence, to impose penalties and to enact legal provisions. The legal measures must require perpetrators to refrain from harassing women and establish procedures for victims, including ensuring they have access to “just and effective” remedies.

## **The international-level social partners**

In addition to their activities at workplace, national and regional level, the social partners have also taken international level action on sexual harassment at work. In 1998, for example, the Executive Board of the International Confederation of Free Trade Unions (ICFTU) adopted an Action Programme to combat sexual harassment within the trade union movement. The ICFTU declared its opposition to sexual harassment, and called on its affiliates and regional organizations to adopt effective measures to eliminate it from all trade union activities. It made a number of suggestions on measures which can be taken to tackle harassment, including the inclusion of a statement of principle in union constitutions; the introduction of measures to ensure that participants at all trade union events are made aware of the policy; and complaints and investigation procedures which cover all trade union activities and workplaces. It also stated that the ICFTU, its regional

<sup>25</sup> The report evaluates legislation in Member States and recent studies on the extent of sexual harassment and its psychological effects. European Commission, op. cit.

<sup>26</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (*Official Journal*, Vol. L269, 5 October 2002, p. 15).

<sup>27</sup> Harassment is defined as “where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. Directive 2002/73/EC, Article 2(2).

<sup>28</sup> Sexual harassment is defined as “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”. Directive 2002/73/EC, Article 2(2).

<sup>29</sup> Directive 2002/73/EC, Article 3.

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organizations and affiliates should institute internal complaints procedures to deal with cases of sexual harassment in union workplaces, which should be included in collective agreements and discussed in special training programmes for all employees, and in basic trade union training courses. International federations have also taken initiatives on sexual harassment. The International Transport Workers' Federation (ITF), for example, launched a campaign on sexual harassment in 1997, which highlighted the mistreatment of female airline employees.<sup>30</sup>

## United Nations

Violence against women shall be understood to encompass, but is not limited to ... physical, sexual and psychological violence ... including ... sexual harassment and intimidation at work.

Source: UN Declaration on Violence against Women, 1993, Article 2.

Within the United Nations, the issue of sexual harassment in the workplace has been addressed as both a manifestation of sex discrimination and a form of violence against women. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted at the time when awareness of sexual harassment was only beginning to emerge and did not therefore contain a specific prohibition. However, the Committee on the Elimination of Discrimination Against Women, set up under the Convention, has since explicitly addressed the problem. Its General Recommendation of 1989 recognized sexual harassment as a form of violence against women.<sup>31</sup> Three years later, in General Recommendation No. 19 of 1992, the Committee characterized gender-based violence as a type of sex discrimination and therefore a breach of CEDAW.<sup>32</sup> The Recommendation notes that “[e]quality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace”. The Committee recommended that parties to the Treaty should take all legal and other measures necessary to provide effective protection for women against gender-based violence, including sexual harassment in the workplace. The work of the Committee was drawn on in developing the 1993 General Assembly Declaration on the Elimination of Violence Against Women, which affirms that this form of violence constitutes a violation of women’s rights and fundamental freedoms.<sup>33</sup> It defines violence against women to encompass “sexual harassment and intimidation at work”, and calls on States to condemn it and pursue a policy to eliminate it. Sexual harassment has also been addressed in the human rights context. The World Conference on Human Rights, held in Vienna in 1993, identified it as a human rights violation,<sup>34</sup> while the Commission on Human Rights has treated it primarily as a form of violence against women. The Commission appointed a

<sup>30</sup> N. David: “The trade union hand”, in *Trade Union World*, Vol. 1, September 1997, note 15.

<sup>31</sup> General Recommendation No. 12, 1989.

<sup>32</sup> General Recommendation No. 19 on violence against women, 1992.

<sup>33</sup> Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104 of 20 December 1993, 85<sup>th</sup> Plenary Meeting.

<sup>34</sup> UN Document A/CONF.157/23 (1993).

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Special Rapporteur in 1995, whose work has included research on sexual harassment at work and the measures which can be taken to prevent it.<sup>35</sup>

The United Nations Fourth World Conference on Women, held in Beijing in 1995, adopted a Platform for Action, which outlines strategic objectives and actions to be taken by a range of actors, includes provisions on sexual harassment in the workplace.<sup>36</sup> It configures the problem as both a form of violence against women,<sup>37</sup> and a barrier to their equality,<sup>38</sup> stating,

The experience of sexual harassment is an affront to a worker's dignity and prevents women from making a contribution commensurate with their abilities.<sup>39</sup>

The Platform calls on governments, trade unions, employers, community and youth organizations, and NGOs to eliminate sexual harassment.<sup>40</sup> More specifically, governments are urged to enact and enforce laws and administrative measures on sexual and other forms of harassment in the workplace.<sup>41</sup> Parties at the enterprise level are called upon to develop workplace policies.<sup>42</sup> In addition, the Platform calls for the generation and dissemination of gender-disaggregated and sex-specific data and information on all forms of violence against women, including sexual harassment.<sup>43</sup> At the June 2000 Special Session of the General Assembly on *Women 2000: Gender equality, development and peace for the twenty-first century*, governments assessed the achievements and the obstacles which have been faced since the Beijing Conference. The Session produced a set of *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, which again address workplace sexual harassment.<sup>44</sup>

<sup>35</sup> “Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women”, Resolution 1994/45 of 4 March 1995.

<sup>36</sup> *Report of the Fourth World Conference on Women* (Beijing, 4-15 September 1995), A/CONF.177/20, 17 October 1995 (New York). The predecessor to the Beijing Platform for Action, the Nairobi Forward-looking Strategies for the Advancement of Women, 1985, had called for measures to prevent workplace sexual harassment.

<sup>37</sup> Violence against women is defined in Paragraph 113 to include “Sexual harassment and intimidation at work”.

<sup>38</sup> Including as a limitation on the harmonization of work and family life, Strategic objective F.6.

<sup>39</sup> Paragraph 161.

<sup>40</sup> Paragraph 126(a). Paragraph 178 also calls on women's organizations and employees to take measures on sexual and racial harassment.

<sup>41</sup> Paragraphs 128 and 178, and Strategic objective F.6.

<sup>42</sup> Paragraph 178.

<sup>43</sup> Paragraph 206.

<sup>44</sup> *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, General Assembly Resolution A/S-23/10/Rev.1, 16 November 2000, Paragraph 21. See also Paragraph 59.

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## International Labour Organization

The International Labour Organization (ILO) has addressed sexual harassment in a range of instruments and during discussions at tripartite meetings. It has also conducted research and training on the issue, and provided information and technical assistance to its constituents. Most recently, it has been stressed that the elimination of sexual harassment and violence at the workplace is a significant element in promoting decent work for women.<sup>45</sup>

### Conventions

Sexual harassment undermines equality at the workplace by calling into question individual integrity and the well-being of workers, it damages an enterprise by weakening the bases upon which work relationships are built and impairing productivity. In view of the gravity and serious repercussions of the practice, some countries are now adopting legislation prohibiting it and making it subject to civil and/or criminal penalties.

Source: Committee of Experts: *Special survey on the application of Convention No. 111 on Discrimination in Employment and Occupation* (Geneva, ILO, 1996), p. 16.

The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), addresses discrimination in employment on a number of grounds, including sex, and requires that ILO member States declare and pursue a national policy designed to promote equality of opportunity and treatment with a view to eliminating discrimination. Like CEDAW, it predates widespread awareness of the issue of sexual harassment. As a consequence, it has been necessary for the Committee of Experts on the Application of Conventions and Recommendations to take the lead. In its 1996 Special Survey on Convention No. 111, the Committee confirmed that it views sexual harassment as a form of sex discrimination against women in employment which undermines equality, damages working relationships and impairs productivity.<sup>46</sup>

The Committee defined sexual harassment as:

[A]ny insult or inappropriate remark, joke, insinuation and comment on a person's dress, physique, age, family situation, etc; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or other gesture associated with sexuality; and any unnecessary physical contact such as touching, caresses, pinching or assault.<sup>47</sup>

This definition, therefore, covers the most frequently targeted forms of sexual harassment, but is also rare in specifically extending to condescending and paternalistic attitudes. The Committee stated that in order to amount to sexual harassment, the behaviour must either "be justly perceived as a condition of employment or precondition for employment or influence decisions taken in this field" and/or "affect job performance".

<sup>45</sup> The elimination of sexual harassment and violence was identified as a priority gender issue in ILO: *Decent work for women: An ILO proposal to accelerate the implementation of the Beijing Platform for Action* (Geneva, March 2000), paper presented at the Symposium on Decent Work for Women; Women 2000: Gender equality, development and peace for the twenty-first century (New York, 5-9 June 2000).

<sup>46</sup> ILO: *Equality in employment and occupation: Special survey on equality in employment and occupation in respect of Convention No. 111* (Geneva, 1996).

<sup>47</sup> Paragraph 39.

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It added that sexual harassment may also arise from “situations which are generally hostile to one sex or the other”, thereby including instances of sex-based harassment in addition to those involving sexual behaviour. Moreover, the Committee stated that the elimination of sexual harassment should “be an integral part of a legislative or other policy, independently of policies on discrimination on the basis of sex”.<sup>48</sup>

The only international Convention which specifically prohibits sexual harassment at work is the Indigenous and Tribal Peoples Convention, 1989 (No. 169). It provides that governments shall do everything possible to prevent any discrimination between workers belonging to the peoples to whom the Convention applies<sup>49</sup> and other workers, including taking measures to ensure that they enjoy protection from sexual harassment.<sup>50</sup>

## **Non-binding instruments**

The ILO has also enacted a number of non-binding instruments which contain provisions on sexual harassment at work. The 1985 International Labour Conference Resolution on equal opportunity and equal treatment for men and women in employment stated that sexual harassment at the workplace is detrimental to employees’ working conditions and to their employment and promotion prospects.<sup>51</sup> It recommended that policies for the advancement of equality include measures to combat and prevent it. Six years later, the 1991 International Labour Conference Resolution concerning ILO action for women workers returned to the issue, inviting the Governing Body to request that the Office develop guidelines, training and information materials on issues of specific and major importance to women workers, including sexual harassment in the workplace. Most recently, in November 2003, the ILO’s Governing Body adopted the *Code of practice on workplace violence in services sectors and measures to combat this phenomenon*, a non-binding instrument which offers guidance in addressing workplace violence in these sectors and which makes specific reference to sexual harassment.<sup>52</sup>

## **Meetings**

A number of ILO Meetings of Experts have considered the issue of sexual harassment. The 1989 Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment, for instance, viewed personal security, including sexual harassment, as a health and safety problem which affected women more than men. The experts felt that special consideration should be given to those occupations and sectors in which women predominate; those in which there is special exposure to the risk of

<sup>48</sup> Paragraph 179.

<sup>49</sup> Article 1 of the Convention provides that it applies to “(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation of the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”.

<sup>50</sup> Article 20(3)(d).

<sup>51</sup> *Official Bulletin* (Geneva), Vol. LXVIII, Series A, No. 2, 1985, pp. 85-95.

<sup>52</sup> ILO: *Workplace violence in services sectors and measures to combat this phenomenon* (Geneva, 2004). See 4.1.2 (risk assessment).

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violence; and those in which women have not traditionally been employed. The 1990 Tripartite Symposium on Equality of Opportunity and Treatment for Men and Women in Employment in Industrialized Countries concluded that prevention is the best approach, emphasized the importance of enterprise-level policies, and called for the development of awareness campaigns, information sessions and educational programmes.<sup>53</sup> More recently, the 1997 Tripartite Meeting on Breaking through the Class Ceiling: Women in Management concluded that the role of governments and employers' and workers' organizations in promoting the advancement of women included promoting policies on the prevention of sexual harassment. At regional level, a tripartite seminar devoted exclusively to sexual harassment was held in Manila in 1993. The participants exchanged information and experience of measures taken to combat harassment in their countries and discussed the range of ways in which it could most effectively be countered.<sup>54</sup> Sexual harassment was also discussed in October 2003 by the Meeting of Experts to Develop a Code of Practice on Violence and Stress at Work in Services, which produced the *Code of practice on workplace violence in services sectors* discussed above.

## Research

The ILO has conducted research on the dynamics of sexual harassment at work and methods of addressing it. The 1992 edition of its *Conditions of Work Digest* was devoted to sexual harassment. It reviewed legal measures and enterprise policies across 23 industrialized countries, action taken by international organizations, and measures recommended by governments, employers' and workers' organizations, and women's groups. In 1999, it published an annotated bibliography reviewing literature in this area. A number of other publications have specifically examined sexual harassment, or included it as part of more wide-ranging discussions.<sup>55</sup>

## Conclusion

Workplace sexual harassment has been addressed at the regional and international levels as both an aspect of gender discrimination and a form of violence against women. The United Nations Committee on the Elimination of Discrimination Against Women has expressed the relationship between these two approaches by identifying sexual harassment as a form of violence against women and gender-based violence as a type of sex discrimination. At the regional level, the European Union, one of the first bodies to take the problem seriously, has adopted binding legal measures on sexual harassment, while the Organization of American States has addressed it in its Convention on Violence Against Women. At the international level, workers' organizations have called on their affiliates to adopt measures and provided guidance on their content. Various UN instruments call for its elimination, including the Platform for Action adopted at the United Nations Fourth

<sup>53</sup> Pages 11-12.

<sup>54</sup> ILO Regional Office for Asia and the Pacific: *Tripartite regional seminar on combating sexual harassment at work, Manila, 22-26 November 1993: Proceedings* (Geneva, 1994).

<sup>55</sup> See, for example, D. Chappell and V. Di Martino: *Violence at work*, Second edition (Geneva, ILO, 2000); ILO: *Sexual harassment at the workplace in Nepal* (Kathmandu, 2004); N. Haspels, Z.M. Kasim, C. Thomas and D. McCann: *Action against sexual harassment at work in Asia and the Pacific* (Bangkok, ILO, 2001); N. Kapur: "Sexual harassment at the workplace: A guide to sexual harassment law in India", in A. Kapur (ed.): *Women workers' rights in India: Issues and strategies — A defence guide* (New Delhi, ILO, 1999), p. 119; A. Reinhart: *Sexual harassment: Addressing sexual harassment in the workplace — A management information booklet* (Geneva, ILO, 1999); K.A. Rogers and D. Chappell: *Preventing and responding to violence at work* (Geneva, ILO, 2003).



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World Conference on Women in Beijing in 1995. Within the International Labour Organization, sexual harassment has been the focal point of meetings, research, and advice and information issued to its constituents. In recent years, its significance has been recognized by its inclusion as an element of the ILO's programme of promoting decent work worldwide.

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### III. National laws

#### Introduction

Although sexual harassment at work has been legally prohibited in some countries for more than two decades, until fairly recently only a few jurisdictions had enacted legislation on this subject. Since the mid-1990s, however, the number of countries in which laws have been enacted has more than doubled. During this period, legislative provisions on sexual harassment have been enacted and existing provisions interpreted to combat harassment in countries in all regions. It is also apparent that legal approaches to tackling sexual harassment have become increasingly sophisticated as provisions on definitions, procedures, liability, remedies, and sanctions have been designed to respond to the increasing awareness of the nature and extent of sexual harassment and to draw on the experience of the jurisdictions which have addressed it.

#### Extent and nature of legal prohibitions

Sexual harassment in the workplace was first addressed through law in the mid-1970s at the culmination of a campaign in the United States to have it recognized as a form of sex discrimination under the federal Civil Rights Act.<sup>56</sup> Since this initial recognition of the problem, a growing number of countries in all regions of the world have enacted legislative provisions on sexual harassment. Three main approaches have been adopted. Firstly, in many countries, the courts have categorized specific acts of harassment as a form of some other kind of prohibited conduct, such as sexual assault or defamation, without explicitly referring to “sexual harassment”. This approach was common in many jurisdictions even prior to widespread awareness of the whole range of forms which sexual harassment can take. Secondly, in a number of countries, courts and tribunals have taken the lead by explicitly referring to sexual harassment and recognizing it as a distinct form of some broader type of prohibited behaviour. Most commonly, it has been recognized as a form of sex discrimination and prohibited under equality or anti-discrimination laws. Finally, legislatures have enacted legislation, or amended existing provisions, to specifically prohibit workplace sexual harassment. It appears that almost 50 countries directly prohibit it in legislation.<sup>57</sup> The majority have taken this step very recently: at least 35 have legislated against sexual harassment for the first time over the period since 1995.<sup>58</sup>

<sup>56</sup> See MacKinnon, *op. cit.*

<sup>57</sup> Argentina, Australia, Austria, Bangladesh, Belgium, Belize, Canada, Costa Rica, Croatia, the Czech Republic, Denmark, Dominican Republic, Fiji, Finland, France, Germany, Guyana, Honduras, Iceland, Ireland, Israel, Japan, the Republic of Korea, Latvia, Lesotho, Lithuania, Luxembourg, Malta, Mauritius, Namibia, the Netherlands, New Zealand, Norway, Panama, Paraguay, the Philippines, Poland, Portugal, Romania, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, the United Republic of Tanzania, Uruguay, Venezuela.

This figure refers only to those countries in which sexual harassment is universally prohibited at the national or federal level. It therefore excludes those in which it is prohibited only at the state or provincial level or for specific sectors, e.g. the civil service or public sector.

<sup>58</sup> Costa Rica, Finland, Panama, Paraguay, the Philippines, Sri Lanka, Switzerland (1995); Belize (1996); Guyana, Japan, Uruguay (1997); Honduras, Ireland, Israel, Lithuania, Mauritius, Portugal, South Africa, the United Republic of Tanzania, Thailand (1998); Fiji, Japan, Venezuela (1999);

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## Legal definitions of sexual harassment

### *The extent of legal definitions*

Most of the jurisdictions in which sexual harassment is directly prohibited include a definition in their legislation. In others, the legislation states that sexual harassment is prohibited, leaving the decision-making bodies to clarify the kinds of actions covered and the circumstances in which they will be prohibited. This approach threatens uncertainty while the parameters of the definition are established. In those legal systems in which definitions form part of the legislation, some are relatively succinct. In contrast, some statutory definitions are more detailed. The Israeli Prevention of Sexual Harassment Law, for example, sets out a list of six different kinds of behaviour covered by the Act. In jurisdictions in which the prohibition of sexual harassment is a judicial innovation, contrasting approaches have been taken to defining it. In India, the Supreme Court has issued a set of detailed guidelines on measures which must be adopted by employers to prevent sexual harassment, which include an extensive definition (see box below).<sup>59</sup> In other jurisdictions, the courts have established the parameters of sexual harassment on a case-by-case basis.

#### **Definition of sexual harassment: India**

Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- physical contact and advances;
- a demand or request for sexual favours;
- sexually coloured remarks;
- showing pornography;
- any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

Source: Supreme Court of India in *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

### ***Quid pro quo and hostile working environment harassment***

Sexually harassing behaviour is often categorized as either “*quid pro quo*” or “hostile working environment” harassment, a distinction stemming from the jurisprudence of the American courts. *Quid pro quo* sexual harassment takes place when a job benefit — a pay rise, a promotion, or even continuing employment — is made dependent on the victim acceding to demands to engage in some form of sexual behaviour. It was the first kind of sexual harassment to be prohibited when it was recognized by the US District Court for the District of Columbia in 1976.<sup>60</sup> The second category, hostile working environment harassment, covers conduct that creates a working environment which is unwelcome and offensive to the victim. It encompasses the range of sexually harassing behaviour that does not involve sexual blackmail: sex-based comments, disparaging remarks about the sex of the target, innuendos, the display of sexually suggestive or explicit material, etc. Hostile working environment harassment was also initially named, legally recognized, and

Bangladesh, Iceland, Luxembourg (2000); Denmark (2001); Norway, Romania (2002); Croatia, Malta, Poland, Slovakia (2003); the Czech Republic, Latvia (2004).

<sup>59</sup> *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, Guideline 2.

<sup>60</sup> *Williams v. Saxbe*, 413 F.Supp 654 (DDC 1976).

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prohibited in the United States, first in guidelines issued by the U.S. Equal Employment Opportunities Commission (EEOC), and subsequently by the courts.<sup>61</sup>

Other countries have followed the United States by drawing a distinction between *quid pro quo* and hostile working environment sexual harassment. Most of the legislation which defines sexual harassment can be convincingly interpreted as prohibiting both forms. Despite the widespread adoption of a distinction between *quid pro quo* and hostile working environment harassment, it is possible to define sexual harassment in a way which captures all of its forms, for example, by viewing *quid pro quo* harassment as one of the types of behaviour which create a hostile working environment. This unified approach has been adopted in Canada, where the courts have downplayed the two-fold distinction developed in the United States.<sup>62</sup>

## **Unwelcomeness**

The definition of sexual harassment as behaviour unwelcome to its recipient, discussed in Chapter I, has been adopted in most legislation. Even in jurisdictions which rely on decision-making bodies to define sexual harassment, however, “unwelcomeness” is usually required. The Indian Supreme Court guidelines, for example, specifically require that the behaviour in question be unwelcome to its target (see box above), while American cases have incrementally established “unwelcomeness” as a necessary criterion for a finding of sexual harassment.<sup>63</sup> An issue which often emerges in this regard is whether the recipient must clearly indicate the unwelcomeness of the behaviour. In a few jurisdictions, the legislation explicitly states that the victim must do so. In Israel, for example, some of the actions identified as sexual harassment in its legislation, including repeated propositions and references to sexuality, constitute sexual harassment if the recipient has shown that he or she is not interested.<sup>64</sup> With respect to *quid pro quo* harassment, the legislation in the Philippines makes clear that it will constitute sexual harassment whether or not it is acceptable to the person to whom it is addressed.<sup>65</sup>

## **Reasonableness**

Legislatures and courts in most jurisdictions attempt to impose limitations on the kinds of actions that will be considered sexual harassment rather than relying solely on the perception of the claimants. The most common technique is to require that the behaviour be unreasonable. Some statutes specifically embody this standard of reasonableness. In Malta, for example, the legislation requires that sexual conduct “could reasonably be regarded as ... offensive, humiliating or intimidating”.<sup>66</sup> In this and other jurisdictions, the decision-making bodies are left to determine what can be considered reasonable in any

<sup>61</sup> Hostile working environment harassment was recognized by the U.S. Supreme Court in 1986 in *Meritor Savings Bank v. Vinson*, 477 U.S. 57(1986).

<sup>62</sup> See R. Mead Zweighaft: “What’s the harm? The legal accommodation of hostile environment sexual harassment”, in *Comparative Labor Law Journal*, Vol. 18, 1997, pp. 457-459.

<sup>63</sup> The EEOC Guidelines on discrimination because of sex also require that the behaviour be “unwelcome” [§1604.11(a)], available at [www.access.gpo.gov](http://www.access.gpo.gov).

<sup>64</sup> Israel: Prevention of Sexual Harassment Law.

<sup>65</sup> Philippines: Anti-Sexual Harassment Act, Article 3.

<sup>66</sup> Malta: Equality for Men and Women Act, Section 9(1)(c).

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particular set of circumstances. In addition, in countries in which there is no legislation, the standard of reasonableness has been introduced and expanded on solely by courts and tribunals.

Clearly, then, the ways in which decision-making bodies conceptualize “reasonableness” is vital to the effectiveness of sexual harassment legislation. A common approach is to ask whether “the reasonable person” would find the behaviour offensive. This has engendered criticism from commentators who pointed to research indicating that men and women tend to differ in their assessment of what constitutes offensive behaviour. These critics argued that the “reasonable person” standard is not sufficiently grounded in the perceptions of women, the primary victims of sexual harassment in the workplace, and argue that behaviour should be judged from the perspective of a “reasonable victim” or “reasonable woman”.

## ***Repetition***

Another issue which has been raised in a number of jurisdictions is whether sexual harassment should be defined to require that the offensive actions must be repeated. In most jurisdictions, it is accepted that certain conduct is so offensive that it need take place on only one occasion to constitute sexual harassment. In jurisdictions where there is no specific mention in the legislation, courts and tribunals have addressed this issue, usually concluding that the offensive behaviour need not be repeated. In the United Kingdom, for example, it has been held that a single act can constitute sexual harassment.<sup>67</sup> On the other hand, where some apparently minor conduct is at issue — requests for dates, for instance, or inquiries about a worker’s private life — courts and tribunals often require that the behaviour be repeated in order for the complaint to be considered reasonable.

## ***Sex-based and sexual behaviour***

A distinction can be drawn between laws which confine their definition of sexual harassment to sexual conduct and those which define it to include sex-based behaviour. The first category encompasses harassing behaviour premised on the fact that the victim is a woman (or, less often, a man). Disparaging comments on the role of women, their place in the labour market, or their skills and capabilities could all be sex-based harassment, as could mistreatment aimed only at women, such as inaccurate criticisms of job performance, obstruction, etc. Sexual conduct, in contrast, refers to forms of behaviour which are explicitly sexual, such as inappropriate touching, sexual comments or jokes, and sexual violence. Statutory provisions have tended to focus mainly on conduct of a sexual nature, rather than sex-based harassment. The European Union’s revised Equal Treatment Directive, however, which must be implemented at national level in all EU Member States, covers both sexual behaviour and harassment related to the sex of a person. The latter form of harassment is defined as occurring “where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.<sup>68</sup>

<sup>67</sup> *Insitu Cleaning Co. Ltd. V. Heads* [1995] IRLR 4.

<sup>68</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (*Official Journal*, Volume L269, 5 October 2002, p. 15), Article 2(2).

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## Identity of the perpetrator

The legislative provisions which identify the potential perpetrators of sexual harassment can be crucial to their effectiveness. They determine whether a harasser can be held legally responsible, and therefore compelled to compensate the victim. They are also important in encouraging employers to introduce preventive measures to protect their workers from harassment by the whole range of individuals who have the opportunity to engage in it, including supervisors, co-workers, contractors, clients and customers. In legal systems in which the prohibition is confined to *quid pro quo* harassment, the coverage of the legislation is inevitably restricted to those who control the benefits used as the incentive in the sexual blackmail. In other jurisdictions, however, the range of perpetrators can be more extensive. Some laws are confined to employers and supervisors. In Belize, for example, an employer, a supervisor and a prospective employer can be held responsible.<sup>69</sup> Similarly, in Thailand, the legislation covers the actions of bosses, chiefs, work supervisors and work inspectors.<sup>70</sup> Usually, legislation extends to the actions of colleagues of the victim. However, the most comprehensive national legal measures also extend to the conduct of non-employees, such as contractors, customers and clients. The New Zealand Employment Relations Act explicitly prohibits sexual harassment by non-employees,<sup>71</sup> as does the German Protection of Employees Act.<sup>72</sup> Other legislative measures which define the harasser in neutral terms, for example as “any person”, can also cover non-employees. In addition, under the case-law approach, a range of harassers have been recognized. In the United States, for instance, harassment by third parties has been held to be covered by its legislation.<sup>73</sup>

## Identity of the victim

National laws have also adopted differing perspectives on who can bring a claim as a victim of sexual harassment. The common thread is that female employees are generally recognized as the primary victims. Over the past decade, however, the increasing awareness that sexual harassment can take other forms has influenced legislators and decision-making bodies. The three questions which have attracted most attention in recent years are whether men are legally recognized as victims of sexual harassment; whether same-sex harassment is prohibited; and whether sexual harassment of lesbians and gay men is prohibited.

## Men as victims of sexual harassment

Sexual harassment was first recognized in law in response to the experience of women workers. Moreover, it is still, to a very large degree, women who are its victims.<sup>74</sup> However, it is apparent from survey evidence that a significant number of men are also subjected to harassment in the workplace. This growing recognition of harassment of men

<sup>69</sup> Belize: Protection against Sexual Harassment Act, 1996.

<sup>70</sup> Thailand: Labour Protection Act, 1998, Section 16.

<sup>71</sup> New Zealand: Employment Relations Act 2000, Section 108(2).

<sup>72</sup> Germany: Protection of Employees Act, Section 3(2).

<sup>73</sup> See *EEOC v. Sage Realty Corp*, 507 F. Supp. 599 (S.D.N.Y., 1981).

<sup>74</sup> See Chapter I.

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has inspired legal innovations in a number of countries aimed at extending existing prohibitions to cover them. Among the jurisdictions which prohibit sexual harassment through legislation, in very few the legislation states that it is restricted in its application to women.<sup>75</sup> At the opposite end of the spectrum, some legislation, like that of Belgium, explicitly applies to both women and men.<sup>76</sup> Most legislative prohibitions, however, are not so explicit, but if worded to apply to either “an employee” or to “a person”, can be interpreted to protect all victims of sexual harassment. In those countries in which there are reported decisions on the harassment of men, it has been prohibited, at least when perpetrated by women. However, jurisdictions that prohibit sexual harassment indirectly under sex discrimination provisions have had difficulties in recognizing same-sex harassment of men, as discussed in the following section. In addition, in countries in which sexual harassment is prevented indirectly under protective legislation, such as the criminal legislation in Pakistan which prohibits “outraging the modesty of a woman”,<sup>77</sup> men are inevitably precluded from bringing complaints.

### **Same-sex harassment**

A more controversial issue in sexual harassment policy and jurisprudence, which is only beginning to emerge in many jurisdictions, is how to recognize the perpetrator of harassment against an individual of the same sex. Although legislation does not tend to specifically mention same-sex harassment, measures which refer to victims in neutral terms, such as harassment of “a person” by “another person”, could be interpreted to encompass it. But problems have emerged in jurisdictions which rely on the interpretation of sex discrimination legislation to prohibit sexual harassment. The judiciary in these jurisdictions tends to look for circumstances in which one sex disproportionately encounters detrimental treatment. Confronted with same-sex harassment, courts have found application of the law complex. Where the harasser is a gay man or lesbian, they have assumed that the behaviour would not be directed at an individual of the opposite sex and concluded that it is therefore discriminatory. Difficulties arise, however, where both parties are assumed by the courts to be heterosexual, although the US Supreme Court has recently recognized “heterosexual same-sex harassment”.<sup>78</sup> These kinds of difficulties are less likely to arise in legal systems which define sexual harassment to include sexual conduct independently of the notion of sex discrimination.

### **Sexual harassment of lesbians and gay men**

The third issue being addressed in a number of countries is whether sexual harassment laws adequately cover harassment of lesbians and gay men. Again, where the legislation prohibits sexual conduct, harassment of lesbians and gay men which takes this form is covered. In contrast, harassment premised on the sexual orientation of the victim, such as disparaging remarks about gay men and lesbians, is generally excluded, captured only by laws fashioned specifically to prohibit discrimination and harassment on grounds of sexual orientation. But in countries in which sexual harassment is recognized indirectly as a form of sex discrimination, there can be problems in proscribing even sexualized conduct directed at gay men and lesbians.

<sup>75</sup> The Thailand Labour Protection Act 1998, for example, proscribes sexual harassment when the victim is “an employee who is a female or a child” (Section 16).

<sup>76</sup> Belgium: Law on the well-being of workers, dated 4 August 1996, Chapter Vbis, Article 32bis.

<sup>77</sup> Pakistan: Penal Code, Section 509.

<sup>78</sup> *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998).

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## Branches of the law

In the 47 countries in which legislation on sexual harassment in the workplace has been identified, it is prohibited under a number of different branches of the law. Sexual harassment may even be addressed under more than one legal branch in the same jurisdiction;<sup>79</sup> and in those countries in which it is specifically prohibited in legislation, cases may also be brought under other branches of the law. In the Netherlands, for example, criminal law provisions have been used despite specific labour law provisions,<sup>80</sup> while the equality legislation in Japan has not prevented claims being made under tort law. It is also possible for the same behaviour to be addressed in more than one legal claim. A sexual assault, for example, can simultaneously be the subject of both civil and criminal proceedings. The most common branches of the law are discussed in this section: sexual harassment law, equality and sex discrimination law, human rights law, labour law, tort law and criminal law.

### ***Sexual harassment law***

Recent years have witnessed a trend towards the introduction of specific measures on sexual harassment. Countries have enacted national-level legislation devoted to sexual harassment, including Belize, Costa Rica, Israel and the Philippines.<sup>81</sup> Some are hybrid laws that establish legislative regimes for the prohibition of sexual harassment through provisions drawing on elements from different branches of the law. The Philippines Anti-Sexual Harassment Act, for example, allows victims of sexual harassment the option of filing a criminal complaint, making an administrative complaint within the workplace or bringing a civil case for damages.

### ***Anti-discrimination law***

In half of the countries which have enacted legislation, provisions on sexual harassment have been included in their equality and sex discrimination laws.<sup>82</sup> In conjunction with this trend towards specific inclusion, in jurisdictions in which sexual

<sup>79</sup> More recently, in Canada and New Zealand, for example, sexual harassment is explicitly proscribed under both labour law and human rights law.

<sup>80</sup> European Commission: *General report 1998 of the Legal Experts' Group on Equal Treatment of Men and Women* (Brussels, 1999), p. 112.

<sup>81</sup> Belize: Protection against Sexual Harassment Act; Costa Rica: Law on Sexual Harassment in Employment and Education; Israel: Prevention of Sexual Harassment Law; Luxembourg: Law of 26 May 2000 on Protection against Workplace Sexual Harassment; Philippines: Anti-Sexual Harassment Act.

<sup>82</sup> Australia (Sex Discrimination Act); Austria (Equality of Treatment Act); Denmark [Gender Equality (Consolidation) Act]; Finland (Act on Equality between Women and Men, 1995); Germany (Act to Establish Equality for Men and Women); Guyana (Prevention of Discrimination Act, 1997); Honduras (Law on Equal Opportunities for Women); Iceland (Act on the Equal Status and Equal Rights of Women and Men); Ireland (Employment Equality Act, 1998); Japan (Equal Employment Opportunity Act); Republic of Korea (Equal Employment Act); Lithuania (Law on equal opportunities); Malta (Equality for Men and Women Act); Mauritius (Sex Discrimination Act); Netherlands (Equal Treatment Act); Norway (Gender Equality Act); Romania (Law on equal opportunities); South Africa (Employment Equity Act); Sweden (Equal Opportunities Act, 1991); Switzerland (Law on equality); Uruguay (Decree No. 37/997 regulating Law No. 16045 on the need for effective implementation of equality of treatment and opportunities at work); Venezuela (Organic Law on the Rights of Women to Fairness and Equality).



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harassment is not referred to in the legislation, it is common for the legislation to be interpreted to cover it. Advancing sexual harassment jurisprudence under sex discrimination laws was pioneered in the United States in decisions in cases brought under Title VII of its Civil Rights Act. The argument which is made is that, since sexual harassment is directed primarily at women, they are disproportionately subjected to detrimental treatment in the labour force and it is therefore a form of sex discrimination. The sex discrimination approach is particularly prevalent in jurisdictions in which equality or anti-discrimination legislation is the only route available to victims of sexual harassment. It remains the primary legal mechanism in the United States and in a number of other jurisdictions, including Greece and the United Kingdom. In addition, in the landmark Supreme Court of India case from 1997, *Vishaka v. the State of Rajasthan*,<sup>83</sup> the decision was based partly on the gender equality provisions of the Indian Constitution.<sup>84</sup>

## **Labour law**

Labour law is also used to combat sexual harassment in the workplace. In more than one-third of countries, specific provisions are included in labour legislation.<sup>85</sup> The New Zealand Employment Relations Act 2000, for example, contains a set of provisions which address sexual harassment as a “personal grievance” against the victim’s employer that can be pursued through a procedure outlined in the Act. In addition to these kinds of specific measures, other labour law prohibitions may be interpreted to encompass sexual harassment in individual cases. Certain kinds of labour laws have been particularly prevalent in the legal treatment of sexual harassment, most prominently unfair dismissal, contract of employment, and health and safety laws. Unfair dismissal provisions have been interpreted to cover dismissals arising from sexual harassment in three sets of circumstances: when a worker is dismissed for refusing to engage in sexual activity, complaining about sexual harassment or taking legal action; where a victim is forced to resign and claims constructive dismissal; and where an employer is held to be justified in dismissing the harasser. Also, in most countries which have specific provisions, the legislation provides that related dismissals will be held to be unfair. In Malaysia, for example, the Industrial Court explicitly recognized sexual harassment in *Jennico Associates Sdn Bhd v. Lilian Therera De Costa*, a constructive dismissal case.<sup>86</sup> The Chairperson stated:

<sup>83</sup> (1997) 6 SCC 241.

<sup>84</sup> “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India” (Constitution of India, Article 14); “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them” (Constitution of India, Article 15).

<sup>85</sup> Belgium (Law of 4 August 1996 on the well-being of workers); Canada (Canada Labour Code); Czech Republic (Labour Code); Dominican Republic (Labour Code); France (Labour Code); Latvia (Labour Code); Lesotho (Labour Code); Mauritius (Labour Act); Namibia (Labour Act, 1992); Netherlands (Working Conditions Act 1998); New Zealand (Employment Relations Act, 2000); Panama (Labour Code); Paraguay (Labour Code); Poland (Labour Code); Slovakia (Labour Code); Spain (Worker’s Statute); Thailand (Labour Protection Act, 1998).

<sup>86</sup> [1996] 2 ILR 1765.

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It cannot .... be emphasized strongly enough that sexual harassment of an employee by an employer would constitute repudiatory conduct on the part of the latter such as would entitle the former to bring the contract of employment to an end.<sup>87</sup>

Secondly, laws regulating contracts of employment, which specify the contractual rights and duties of employees and employers, are also used to tackle sexual harassment. In some jurisdictions, the rights and duties of the contract of employment have been held to include a duty not to engage in certain forms of sexually harassing behaviour.<sup>88</sup> Finally, health and safety laws have been interpreted in ways which protect victims of sexual harassment and indirectly prohibit some of its forms. In Canada, for example, provincial occupational health and safety laws have been applied to this effect,<sup>89</sup> and in Trinidad and Tobago, sexual harassment has been recognized and prohibited as a breach of the right to enjoy a safe working environment.<sup>90</sup> In India, the prohibition of sexual harassment in the *Vishaka* case was partly based on the “right to work” article of the Constitution of India.<sup>91</sup>

## **Human rights law**

A prohibition of sexual harassment is included in the national human rights legislation of three countries: Canada, Fiji and New Zealand.<sup>92</sup> These statutes apply to harassment in a range of contexts, including education and housing, but refer specifically to workplace harassment. In India, the *Vishaka* decision was partly grounded on the constitutional right to life and liberty.<sup>93</sup>

## **Tort law**

Victims of sexual harassment can have recourse to tort law in a significant number of countries. In these jurisdictions, their treatment constitutes a civil wrong for which they can be granted a remedy, usually in the form of damages. Where no specific provisions exist, the only available form of redress is often the interpretation of existing torts, such as personal injury, assault and battery, or defamation, to extend to incidences of sexual harassment. Through this approach, tort law is potentially applicable in most countries. In some, it is the primary mechanism through which victims can seek legal redress. In Japan, for example, since the equality legislation specifically prohibiting sexual harassment does not permit individuals to initiate legal claims, tort law is still widely used. If an act of

<sup>87</sup> *ibid.*, 1794, cited in M.K. Zaitun: *Action against sexual harassment in the workplace: Asian women's perspective*, unpublished report commissioned by the ILO for the Regional Tripartite Seminar on Action against Sexual Harassment at Work in Asia and the Pacific, Penang (Malaysia), 2-4 October 2001.

<sup>88</sup> Belgian contract of employment law has been interpreted to this effect.

<sup>89</sup> For example, the Ontario Occupational Health and Safety Act in *Au v. Lyndhurst Hospital* [1996] O.L.R.B. Rep 456.

<sup>90</sup> *Bank Employees' Union v. Republic Banks Ltd.*, Trade Dispute No. 17 of 1995.

<sup>91</sup> Article 19(1)(g) embodies the right to “practice any profession or to carry out any occupation, trade or business”. The court interpreted the Article as requiring a safe working environment.

<sup>92</sup> Canada: Canadian Human Rights Act; Fiji; Human Rights Commission Act, 1999; New Zealand: Human Rights Act, 1993.

<sup>93</sup> “No person shall be deprived of his life or personal liberty except according to procedure established by law” (Article 21).

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sexual harassment infringes on certain “personal rights” guaranteed by the Civil Code (the right to self-determination in sexual matters, to personal dignity and to sexual freedom), it is a tort for which the victim must be compensated.<sup>94</sup> In jurisdictions which have enacted comprehensive sexual harassment laws, they may provide that the behaviour constitutes a tort and must be compensated.

## **Criminal law**

Sexual harassment is also prohibited under the criminal law of some countries. At least eight national-level jurisdictions have enacted criminal provisions.<sup>95</sup> In Venezuela, for example, legislation addresses harassment as a form of violence against women. In addition to prohibition under criminal law, sexual harassment laws provide for a whole range of remedies and sanctions derived from different branches of the law, including criminal sanctions. In Israel, the Prevention of Sexual Harassment Law 1998 designates sexual harassment as both a criminal offence and a civil wrong, making the perpetrator liable both to imprisonment and to compensating his victim. In Venezuela, the Law on Violence Against Women and the Family prohibits sexual harassment as a crime with the accompanying penalties, while also providing for a remedy of damages for the victim.

In the absence of specific provisions, other kinds of criminal measures may be particularly apt for addressing sexual harassment. Criminal laws intended to protect minors, for example, can be used to shield them from sexual harassment in their places of work. In Antigua and Barbuda, for example, the Sexual Offences Act contains a prohibition on adults engaging in sexual intercourse with a minor in an employment or work context in which the minor is subject to the adult’s control or direction or receives wages from the adult. A number of penal codes contain provisions which make it a punishable offence to sexually abuse minors by taking advantage of a position of authority. Since young women are among those most frequently subjected to sexual harassment, these provisions may be useful when no other legislative provisions have been enacted. Forms of harassment which involve threats or rewards for sexual activity are also specifically prohibited under the criminal law of certain jurisdictions, even when involving adult victims. Denmark’s Penal Code, for example, prohibits the serious abuse of subordination and financial dependency in order to engage in sexual intercourse outside marriage.

In addition, in some jurisdictions, protective laws have been interpreted to extend to sexual harassment. Prior to the *Vishaka* decision in India, for example, the only relief available to victims of sexual harassment was to seek to have the perpetrator prosecuted for “outraging or insulting the modesty of a woman”. Similar provisions have been enacted in Pakistan, Singapore and Malaysia, while in Viet Nam, it is a crime to offend the dignity

<sup>94</sup> See R. Yamakawa: “We’ve only just begun: The law of sexual harassment in Japan”, in *Hastings International and Comparative Law Review*, Vol. 22, 1999, p. 523. In the *Fukuoka Sekuhara* case, the Fukuoka District Court identified a new category of legally protected interest, the interest in “working in an environment conducive to working”, which is infringed by acts of sexual harassment and can serve as a basis for tort liability [607 RODO HANREI 6 (Fukuoka Dist. Ct., Apr.16, 1992)].

<sup>95</sup> Bangladesh (Suppression of Violence against Women and Children Act), Costa Rica (Penal Code), Mauritius (Criminal Code), Spain (Penal Code), Sri Lanka (Penal Code), United Republic of Tanzania (Penal Code), Venezuela (Law on Violence Against Women and the Family, 1998).

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and honour of women workers.<sup>96</sup> A more recent trend is to enact anti-harassment legislation which, although aimed primarily at preventing stalking, has the potential to be used against certain forms of sexual harassment in the workplace.<sup>97</sup> Finally, in countries in which there are no such obviously applicable provisions, other crimes have been interpreted to encompass some forms of sexual harassment, including assault, indecent assault and sexual molestation.

## **Employer obligations**

Sexual harassment laws in most jurisdictions impose duties on employers. Some impose a duty to respond to incidents of harassment. In Belize, for example, employers are obliged to take immediate action in response to incidents.<sup>98</sup> Others place obligations on employers to introduce preventive measures. In India, they must prevent or deter the commission of acts of sexual harassment;<sup>99</sup> while, in Finland, they must ensure as far as possible that employees are not subjected to sexual harassment.<sup>100</sup> Obligations to prevent sexual harassment may be translated into a set of specific requirements on the employer, usually to introduce a workplace policy and complaints procedure. Employers in Israel are required to establish efficient grievance procedures as part of their duty to take reasonable steps to prevent sexual harassment.<sup>101</sup> In the Philippines, the Anti-Sexual Harassment Act contains detailed provisions obliging employers to issue rules and regulations prescribing appropriate behaviour, procedures and sanctions. Sweden's equality legislation contains some of the most demanding obligations, requiring employers with ten or more employees to submit annual equal opportunity reports which review the action they have taken, including on preventing sexual harassment.<sup>102</sup>

These kinds of employer-obligation provisions can provide an opportunity to ensure the involvement of workers and their representatives in preventing sexual harassment. The Canadian Labour Code, for example, states that employers have to consult with workers or their representatives in issuing a policy statement on sexual harassment. Legislation in the Philippines also allows for relatively extensive employee involvement, including that rules and regulations should be developed in consultation with employee representatives.<sup>103</sup>

<sup>96</sup> Pakistan: Penal Code; Singapore: the Penal Code prohibits assault or the use of force with the intention of outraging modesty; Malaysia: Penal Code (insulting the modesty of a woman); Viet Nam: Labour Code.

<sup>97</sup> This kind of legislation has been enacted in Belgium (Penal Code), New Zealand (Harassment Act, 1997) and the United Kingdom (Protection from Harassment Act, 1997).

<sup>98</sup> Belize: Protection against Sexual Harassment Act, 1996.

<sup>99</sup> *Vishaka*, op. cit., note 54, Guideline 1. The Supreme Court also required that employers report sexual harassment to the relevant authorities where it would constitute an offence under criminal law.

<sup>100</sup> Finland: Act on Equality between Women and Men, 1986.

<sup>101</sup> Israel: Prevention of Sexual Harassment Law, 1998.

<sup>102</sup> Sweden: Equal Opportunities Act, 1991.

<sup>103</sup> Philippines: Anti-Sexual Harassment Act of 1995.

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Dutch legislation obliges employers to regularly evaluate their policies in collaboration with worker representatives.<sup>104</sup>

## Employer liability

Holding a perpetrator liable for his conduct can prevent repetition of the behaviour, help to deter other potential harassers and allow victims to claim compensation. Employer liability may be more significant, however, both to the victim and to other workers in the establishment. Employer liability provisions act as an incentive for employers to develop policies and complaints procedures while allowing the victim to claim damages from the employer who failed to protect her, and to have the harm — such as loss of salary or promotion — remedied. In a number of legal systems, only the harasser can be held liable. This approach is particularly common in jurisdictions in which harassment is addressed solely under criminal law, since usually only perpetrators are held responsible for their crimes. Tort law has more potential for a finding of employer liability, since the victim may be able to argue that her employer is vicariously liable because he/she knew of the harassment and failed to take appropriate action. In legal systems in which employers can be held vicariously liable, however, they may be responsible only for the conduct of their employees, rather than the full range of actors who can perpetrate harassment.

An approach adopted in many jurisdictions is to specifically provide for employer liability in legislation. The question which then arises is the degree to which the employer's knowledge of the specific act of sexual harassment should affect its liability. The legislation in the Philippines provides that the employer will be liable for acts of sexual harassment of which he/she was informed if immediate action was not taken.<sup>105</sup> In some countries, employers can be held to be liable for sexual harassment of which they should have been aware. In the United States, for example, the Supreme Court has held that employers will be liable unless they can demonstrate they exercised reasonable care to prevent and remedy sexual harassment in their workplace and that the employee failed unreasonably to take advantage of the internal procedures.<sup>106</sup>

Another issue which must be addressed is the range of actors for whom the employer will be liable. Again, the legislation can provide extensive coverage. But where it does not mention whether the employer will be liable for the acts of non-employees, such as business contacts or clients, the courts in some jurisdictions have had to make this determination. In the United States, for example, the case of *EEOC v. Sage Realty Corp.* concerned female employees required to wear revealing clothing, who were subjected to sexual remarks and propositions from customers and clients.<sup>107</sup> The employer was held liable for insisting that the employees wear the uniform, despite being aware that they were a target for comments and propositions which were unwelcome and offensive.

## Procedures

Procedures for sexual harassment complaints differ across jurisdictions and according to the branch of the law under which they are brought. The procedures can influence

<sup>104</sup> Netherlands: Working Conditions Act 1998.

<sup>105</sup> Philippines: Anti-Sexual Harassment Act of 1995.

<sup>106</sup> *Burlington Industries, Inc. v. Ellerth*, 524 US 743 (1998).

<sup>107</sup> *op. cit.*, note 37.

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whether victims will be likely to initiate a legal claim. It has been suggested, for instance, that the problems often confronted in proving sexual harassment, and a reluctance to publicly discuss matters which are distressing or embarrassing, may dissuade victims from seeking legal redress.<sup>108</sup> Criminal law and civil law claims brought under general provisions are usually conducted according to the ordinary procedures, which are often criticized for being too public, too complex, isolating for the complainant and insufficiently responsive to the difficulties of proving sexual harassment. In some jurisdictions, special agencies, adjudicatory bodies and procedures have been introduced to respond to these kinds of concerns.

### ***Enforcement agencies and specialized tribunals***

In many countries, specialized agencies have been established to enforce equality and sex discrimination laws.<sup>109</sup> In jurisdictions in which sexual harassment claims are brought under human rights law, they may be processed by specialist agencies at national level, as in Canada, Fiji and New Zealand. The role of these agencies is usually to facilitate the filing of complaints, investigate them, and attempt conciliation. Where conciliation is not successful, they may be empowered to bring an enforcement action, authorize the complainant to take the case to court, represent her in court proceedings, or, occasionally, adjudicate on the claim. Although their effectiveness depends on their human and financial resources, due to their investigatory powers and expertise in sexual harassment complaints, enforcement agencies can support victims throughout the process. The power to investigate, for example, allows them to undertake tasks which the victim may find difficult, such as requesting records from the employer. In addition, processing complaints through enforcement agencies is often free, in contrast to ordinary court procedures. Another notable procedural innovation included in federal Australian legislation is to allow claims to be filed in any language, which the enforcement agency then arranges to have translated at its own cost. In addition, where the adjudicator is a specialized body, it may also be more sensitive to the dynamics of sexual harassment in the workplace than the ordinary courts.

### ***Special procedures***

Enacting provisions in legislation offers the opportunity to introduce special procedures to be followed in sexual harassment claims, which ensure that the complainant is treated sympathetically or respond to the evidential problems often encountered. One such device is to permit the complainant to request that an investigator of the same sex be assigned to her case. Procedural provisions can also allow for group actions to be brought. Australian federal legislation allows claims to be lodged by two or more individuals on behalf of others with the same complaint, and by members of a class of people on behalf of that class. In the United States too, a complaint can be filed on behalf of an entire group claiming to have suffered from harassment, in the form of a class action. These kinds of class actions may reduce the risk of victimization of complainants while relieving some of their isolation. In Australia, trade unions can bring claims on behalf of their members,<sup>110</sup> as is the case in Sweden and Israel.

<sup>108</sup> See, for example, the opinion of the German expert in European Commission, *General report 1998 ...*, op. cit., p. 112.

<sup>109</sup> These include Australia, Canada, Finland, Ireland, New Zealand, the Republic of Korea (under the Gender Discrimination Prevention and Relief Act), Sweden and the United States.

<sup>110</sup> Australia: Human Rights and Equal Opportunity Commission Act.

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Confidentiality provisions covering the investigation and conciliation proceedings are also common. They can, for example, preclude agency staff from discussing the complaint or the identities of the parties or allow for private hearings, where appropriate. Tanzanian legislation allows for *in camera* examination of evidence and limits publication of the details of the complaint.<sup>111</sup> Where conciliation is attempted, there may also be provisions that protect the victim from being obliged to face the alleged harasser.

### **Proving sexual harassment**

Proving sexual harassment claims can be difficult, given that it frequently occurs without witnesses. As a result, a high standard of proof, such as “beyond a reasonable doubt”, can prove particularly obstructive to sexual harassment claims. In many jurisdictions in which it is prohibited under criminal law, claims must be substantiated at this level, which can result in a low rate of convictions. A lower standard, such as “on balance of probabilities”, is easier to discharge. Since civil laws often provide for lower standards, they can be more amenable to sexual harassment claims than criminal laws. A related concern for claimants attempting to discharge the burden of proof is the type of evidence which can be taken into account. Some jurisdictions have recognized the nature of sexual harassment and relaxed the ordinary rules of evidence. Group actions also alleviate some of the difficulties involved in substantiating individual claims; for example, where a number of different victims make allegations relating to the same person. An additional evidential problem in sexual harassment complaints has been the emphasis placed on the character of the complaint. Some systems, including under the New Zealand Employment Relations Act 2000, provide that the sexual history or reputation of the complainant cannot be taken into account.

### **Remedies and sanctions**

As a general principle, remedies should ensure that sexually harassing behaviour is stopped; that its victims are adequately compensated for their financial loss and emotional injury; and should act as a deterrent to potential harassers, while encouraging employers to introduce preventive policies. In legal systems in which sexual harassment is addressed as a form of another kind of prohibited behaviour, the ordinary sanctions under the relevant branch of the law are applicable. As a result, in jurisdictions in which the only opportunity for victims of harassment is to bring a criminal case, the ordinary criminal sanctions (usually imprisonment and fines) will apply. The victims will not be awarded compensation, however, unless they also initiate a civil law claim, and employers will not be penalized for failing to prevent the harassment. Tort law claims may result in a payment of damages and a finding of vicarious liability on the part of the employer. But they cannot punish the harasser, other than his being compelled to compensate his victim, and may be unlikely to prevent similar behaviour by someone else.

Even where there are specific legislative provisions, if they rely solely on traditional sanctions, the same limitations will be encountered. However, in a number of jurisdictions the ordinary procedures have been amended. In the United Republic of Tanzania, for example, the sexual harassment legislation amended the criminal procedure so that, in addition to a criminal penalty, a person convicted of a sexual offence can be required to compensate the victim at an amount commensurate to the damages obtainable in a civil action.<sup>112</sup> Certain legislative regimes also facilitate immediate action by victims by

<sup>111</sup> United Republic of Tanzania: Criminal Procedure Act, 1995.

<sup>112</sup> *ibid.*

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allowing them to stop work. In Germany, for example, the Act to Establish Equality for Men and Women grants employees the right to stop work at no loss of pay if their employer has not taken adequate measures to prevent sexual harassment.

Enacting specific provisions also allows remedies and sanctions to be fashioned which can respond to the dynamics of sexual harassment in the workplace; for example, the harasser can be specifically required to stop his behaviour. In Namibia, for example, the Labour Court can issue orders that harassment be discontinued.<sup>113</sup> The harasser can also be required to make amends to the victim in addition to compensation, for example by apologizing or carrying out some other kind of action to mitigate the damage caused by his conduct. In Belize, the courts have extensive powers to make demands of the harasser by requiring that he perform any reasonable act or course of conduct to redress any loss or damage suffered.<sup>114</sup> Legislation can also require that a harasser compensate the victim in a way which takes into account job-related losses — such as missed promotion opportunities — and cover injury to feelings caused by humiliation or loss of dignity. In Venezuela, an offender can be obliged to pay his victim double the amount of economic damage caused by the harassment, taking into account access to promotion and the disruption of job performance.<sup>115</sup>

Equally importantly, specific provisions can also target employers. In Finland and Sweden, the employer is required to pay compensation to the victim. Legislation in force in the Philippines provides for sanctions against employers who do not comply with the comprehensive duties detailed in the legislation. Employers may also be required to reinstate, promote or provide a reference to a victim. They can also be under a duty to take actions aimed at preventing harassment, including introducing policies and procedures, providing training or counselling, and conducting awareness-raising sessions.

## Conclusion

Since it was first addressed through law in the United States in the 1970s, sexual harassment at work has been the subject of legal initiatives in countries across the world. Most significantly, over this period, governments in all regions of the world have enacted specific legislative provisions to combat it, most since 1995. The most comprehensive of these legislative measures include definitions of sexual harassment, which encompass both its *quid pro quo* and hostile working environment forms, and cover both sexual and sex-based behaviour. There has been a tendency to define sexual harassment as behaviour unwelcome to its recipient, subject to the limits of the standard of “reasonableness”. The behaviour of both superiors and colleagues is usually covered, whether directed at women or men. There appear, however, to be limitations in the application of the legislation in some jurisdictions to same-sex harassment and harassment of lesbians and gay men. Although sexual harassment is prohibited under a number of different branches of the law, there are signs of a trend towards enacting specific measures which draw on both civil law and criminal law approaches. Most legislation imposes duties on employers and provides that they can be held liable for the actions of their employees. Although the procedures for enforcement differ, their significance in encouraging individuals to bring claims is increasingly being recognized. Consequently, in a number of jurisdictions, there have been measures introduced which are geared towards allowing victims of workplace harassment to avoid the publicity, complexity and costs which can result from ordinary litigation

<sup>113</sup> Namibia: Labour Act 1992.

<sup>114</sup> Belize: Protection Against Sexual Harassment Act 1996.

<sup>115</sup> Venezuela: Law on Violence against Women and the Family, 1998.



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procedures. These include making specialized agencies and adjudicatory bodies responsible for the enforcement of workplace sexual harassment provisions and designing procedures which are responsive to its dynamics. It has also been recognized that, as a general principle, the remedies and sanctions applied in sexual harassment cases should ensure that the behaviour ends, and provide adequate compensation to its victims. They should also encourage employers to introduce preventive policies and procedures, which are discussed in detail in Chapter V.

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## IV. Initiatives by governments, the social partners and non-governmental organizations

### Introduction

Governments, employers' and workers' organizations, and NGOS in many countries across the world have taken action to prevent sexual harassment at work and aid its victims. Some of these initiatives have been focused around securing legislative prohibition or enforcing legal rights. Others are aimed at raising awareness of sexual harassment and providing advice and guidance to interested parties. This chapter provides an indication of the range of initiatives which are being taken to address this problem.

### Internal policies

Among the primary initiatives governments, employers' and workers' organizations, and other bodies can take to demonstrate their commitment to eradicating sexual harassment is to establish an internal complaints policy. Governments, in particular, have set an example to other employers by prohibiting sexual harassment and introducing policies and procedures to combat it in their own workplaces.<sup>116</sup> Employers' and workers' organizations have also introduced policies and procedures at local and national levels in many industrialized countries and in a number of developing countries, including the Philippines and the United Republic of Tanzania.<sup>117</sup> These policies make clear that harassment by or against their members will be effectively addressed, and cover harassment which takes place in all of the organizations' offices and events.

### Codes of practice and guidelines

Instead of enacting legislation, some governments have issued codes of practice on sexual harassment. In South Africa, for example, the government has issued the *Code of good practice on the handling of sexual harassment cases*, which it developed in conjunction with employers' and workers' organizations and community groups within the National Economic Development and Labour Council.<sup>118</sup> Codes of practice contain similar provisions to legislative measures (a definition of sexual harassment, potential victims and perpetrators, measures to be taken by employers, etc.), but are not legally binding. However, although their provisions are phrased as suggestions to employers and cannot be enforced by individuals, these codes can be highly influential on the content of workplace policies and complaints procedures. In Malaysia, for example, the government issued a *Code of practice on the prevention and eradication of sexual harassment* in 1999.<sup>119</sup> Since then, around 100 companies have introduced its provisions and established complaints mechanisms in line with its guidance.<sup>120</sup> In addition, in the absence of legislation, codes of

<sup>116</sup> See Chapter V.

<sup>117</sup> The Trade Union Congress of the Philippines (TUCP) has issued a policy. The Organization of Tanzania Trade Unions (OTTU) has produced guidelines.

<sup>118</sup> Available at [www.medlac.org.za/docs/agreements/code\\_sexharrass.html](http://www.medlac.org.za/docs/agreements/code_sexharrass.html).

<sup>119</sup> Available at [www.mohr.gov.my/mygoveg/makluman/prevention.htm](http://www.mohr.gov.my/mygoveg/makluman/prevention.htm).

<sup>120</sup> As reported by the Malaysian National News Agency, 15 August 2000.

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practice are often taken into account by courts and tribunals. One particularly influential measure is the guidelines issued by the Equal Employment Opportunity Commission (EEOC) in the United States, the agency responsible for enforcing its federal equality legislation. The guidelines, which include clauses on sexual harassment, have been cited with approval in many cases and the legislative provisions have been interpreted in light of their content.<sup>121</sup> Ultimately, codes can pave the way for the enactment of legislation. In Ireland, for example, a code of practice was issued in 1994, four years prior to the enactment of equality legislation prohibiting sexual harassment.

## Guidance and counselling

Organizations concerned with preventing sexual harassment can also provide guidance on how to develop effective measures, fulfil legal requirements, and advise and counsel victims. One method is to develop model policies and procedures to be used at workplace level. An example of these kinds of initiatives is the *Model Harassment Policy* produced by the Equality Commission for Northern Ireland in 2004. It addresses harassment at work on a number of grounds, including sexual harassment, and is intended to be used by employers and trade unions in developing workplace measures.<sup>122</sup> Employers' organizations have also issued model policies for their members and affiliates. The Employers' Association of New Jersey (EANJ), for example, has produced a model policy. The Japan Federation of Employers Associations (Nikkeiren) produced a manual prior to the coming into force of revisions in the national legislation, with the purpose of advising companies and its municipal offices on compliance with new provisions on sexual harassment. Many trade unions as well produce model policies to guide their representatives and members on dealing with sexual harassment and to use in negotiating policies with employers. At national level, for example, the Congress of South African Trade Unions (COSATU) has produced a *Sexual Harassment Code of Conduct*, which outlines preventive measures and provides guidance on bringing complaints.<sup>123</sup>

Another method used by trade unions to ensure that enterprise policies are introduced is to promote the inclusion of clauses on sexual harassment in collective agreements. In a number of countries, unions and federations have taken action to ensure that sexual harassment is an element of bargaining agendas. COSATU, for example, has requested that its affiliates negotiate sexual harassment policies and procedures. Other workers' organizations have encouraged bargaining on sexual harassment by themselves, producing model clauses which can be adapted for inclusion in collective agreements. The Canadian Communications Energy and Paperworkers Union (CEP), for instance, has issued sample collective agreement language on harassment, including sexual harassment, and encouraged local unions to bargain it into their contracts (see box below), as has the union federation Zensen Domei in Japan. Even where model language is not available, however, negotiators can push for the inclusion of sexual harassment clauses in line with their union's policy. In the United States, sexual harassment clauses have been included in agreements negotiated by a number of unions, including the United Auto Workers' Union and the American Federation of State, County and Municipal Employees.

<sup>121</sup> EEOC: *Guidelines on discrimination because of sex* (Washington, DC, 1980), available at [www.access.gpo.gov/nara/cfr/waisidx\\_03/29cfr1604\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/29cfr1604_03.html).

<sup>122</sup> Equality Commission of Northern Ireland: *Model Harassment Policy* (Belfast, February 2004), available at [www.equalityni.org/uploads/pdf/ModelHP04F.pdf](http://www.equalityni.org/uploads/pdf/ModelHP04F.pdf).

<sup>123</sup> Available at [www.cosatu.org.za/docs/sexhar.htm](http://www.cosatu.org.za/docs/sexhar.htm).

**Canadian Communications Energy and Paperworkers Union (CEP):**

**Sample harassment clause**

- 1.1 The Company shall maintain a harassment-free work environment.
- 1.2 For the purposes of this clause, harassment may be of a personal, sexual or racial nature. It is defined as and may include the following:

Personal harassment is any behaviour by any person that is directed at and offensive to an individual or threatens an individual's job or an individual's performance at work or their economic livelihood.

Sexual harassment is any unwanted attention of a sexual nature, such as remarks about appearance or personal life, offensive written or visual actions like graffiti or degrading pictures, physical contact of any kind or sexual demands. It can occur either on a one-time basis or as a series of incidents, however minor. Sexual harassment is coercive and one-sided and both males and females can be victims.

Racial harassment is any unwanted comments, racist statements, slurs and jokes, racist graffiti and literature, including articles, pictures and posters.
- 1.3 A harassment victim may lodge a harassment complaint with a Local shop steward or union representative or any other member designated by the Local.
- 1.4 The shop steward or the person designated by the Local for this purpose shall investigate any harassment complaint. The investigation procedures shall be the same as for the grievance procedure.
- 1.5 It is important that any harassment complaint process be carried out in a timely fashion and on a confidential basis.
- 1.6 An employee alleging harassment in the workplace has the right, after informing the supervisor or manager, to leave the work area without loss of pay, rights or benefits, and to refuse to return to the work area until such time as an investigation of the complaint has been undertaken.
- 1.7 Where applicable, the shop steward or the person designated by the Local shall follow the grievance procedure. Grievances involving harassment shall be filed at the final step of the grievance procedure.
- 1.8 The redress must reflect the seriousness of the harassment case. It may be an apology, a transfer to another department or a layoff. The harasser, not the victim, must suffer the consequences of his or her actions.
- 1.9 The Company will include compulsory human rights/anti-harassment training in its orientation for new employees. This training will be co-instructed by a member of the Union Executive and will include the CEP anti-harassment policy. In addition to the above, all existing employees, including management, will be given the same human rights/anti-harassment training, on company time.
- 1.10 The Company shall pay for the Local union leadership and shop stewards to attend CEP anti-harassment training.

Source: Canadian Communications Energy and Paperworkers Union (CEP).

Guidance on sexual harassment at work is also often produced and distributed in booklets and manuals. Government ministries, and specialized agencies in particular, frequently publish this kind of material. A notable example is the manual on sexual harassment issued by the Argentinean Department of Labour, which includes advice for employers on the most effective preventive measures and for victims on the procedure to be followed in filing claims. Ensuring widespread dissemination of these kinds of guidance materials is often a major concern for government bodies. The Swedish Equal Opportunities Ombudsman has attempted to ensure widespread use of its handbook on sexual harassment by distributing it to all trade unions and employers organizations with which it comes into contact through complaints, and to organizations which work on equal opportunities in the labour market.<sup>124</sup> Workers' and employers' organizations have also

<sup>124</sup> European Commission, *General report 1996*, op. cit., p. 62.

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provided advice and guidance on preventing sexual harassment for use by their members and affiliates and the wider public. In the United Kingdom, the Transport and General Workers' Union (TGWU) issued *Dealing with sexual harassment*, a booklet which outlines the role of union officers in sexual harassment grievances. Both the Irish Confederation of Trade Unions and the employers' association, IBEC, have issued guidelines on how to deal with sexual harassment. In Sweden, the social partners have worked together to produce a code of practice.<sup>125</sup> Finally, guidance can also be provided on request. In Japan, a Women and Young Workers Office has been established in each government prefecture to provide guidance to anyone who needs it and to encourage employers to implement preventive measures. These Offices also employ counsellors to advise and guide workers who have encountered harassment. Similarly, on the enactment of sexual harassment legislation in Belgium, the government established free telephone services to provide advice and counselling to victims.

## Awareness-raising

It is common for governments to conduct awareness-raising on the existence of sexual harassment, techniques to prevent it, and the content of the relevant legal provisions. In Jamaica, for instance, sexual harassment has been included as an element in government awareness-raising activities aimed at improving the treatment of women in employment. Many of these kinds of programme are aimed at ensuring that newly introduced legislation or codes of practice become widely known among potential victims, harassers and employers. The Malaysian Ministry of Human Resources held nation-wide workshops and seminars as part of an awareness-raising campaign on its *Code of practice on sexual harassment*.<sup>126</sup> In France, too, information brochures were produced for distribution to the general public to call attention to its legislation; while in the Netherlands, a television advertisement campaign was launched by the Ministry of Social Affairs. The Women's Secretariat of the General Confederation of Labour in Greece issued a brochure informing workers of their rights under two judicial decisions prohibiting sexual harassment;<sup>127</sup> and, in the Philippines, the Department of Labor and Employment (DOLE), through its Bureau for Women and Young Workers, has focused on developing and distributing low-cost and widely-available information materials. A poster outlining the provisions of the sexual harassment legislation and an information kit containing a model company policy and procedure have been distributed. Other organizations are also conducting awareness-raising activities in a number of countries. In South Africa, for example, the Sexual Harassment Education Project (SHEP), an NGO which works to improve the environment for women in unions, businesses, government and NGOS, conducts sessions for trade unions and other bodies.

## Training

Government bodies, workers' and employers' groups, and other bodies have also conducted training on sexual harassment and distributed training materials. In the Philippines, the DOLE has developed training modules and conducted training workshops. These sessions, jointly undertaken by the ILO, were attended by chief executive officers, personnel managers, union leaders and workers. The provisions of the Anti-Sexual

<sup>125</sup> *ibid.*, p. 56.

<sup>126</sup> *New Straits Times*, 28 April 2000.

<sup>127</sup> European Commission: *General report 1997 of the Legal Experts' Group on Equal Treatment of Men and Women* (Brussels, 1998), p. 57.

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Harassment Act were explained, and assistance provided on developing workplace policies. The DOLE has also produced training modules on gender sensitivity, counselling and law enforcement, and has provided training to company trainers for use within their own organizations. In St Kitts and Nevis, the Ministry of Women's Affairs and the ILO Office in the Caribbean organized a national workshop in 1997 for government, trade unions, employers and NGOs.

Employers' organizations have also issued guidance on the most effective ways of conducting training on sexual harassment. The *Guidelines on dealing with workplace sexual harassment*, issued by the Irish Business and Employers Confederation, provide guidance on the role and purpose of training for management and supervisory staff (see box below). In India, employers' organizations, including the Federation of Indian Chambers of Commerce and Industry, have conducted gender training programmes for their staff;<sup>128</sup> while the Employers' Confederation of the Philippines has integrated sexual harassment into its seminars on gender and development.<sup>129</sup> Some employers send their employees to seminars organized by NGOS. In India, the National Institute of Public Co-operation and Child Development organized a workshop on gender sensitization, which included a half-day session on sexual harassment, and was attended by staff from government departments.<sup>130</sup>

Unions, too, have taken responsibility for training their own members. The CEP in Canada has trained stewards and leaders in the skills required to deal effectively with complaints. It has also produced educational materials. In Ireland, the ICTU conducts training courses for its members. In South Africa, SHEP has developed education and awareness-raising programmes on gender-sensitive behaviour to be included in union education programmes for all officials and members,<sup>131</sup> and worked with COSATU affiliates to develop educational assistance and conducted workshops for union members, shop stewards and education coordinators. In Sri Lanka, some trade unions conduct gender sensitization programmes for top- and middle-level unionists, which include training on sexual harassment.<sup>132</sup>

<sup>128</sup> The Lawyers Collective, op. cit., p. 36.

<sup>129</sup> Ursua, op. cit., p. 35.

<sup>130</sup> The Lawyers Collective, op. cit., p. 34.

<sup>131</sup> European Commission, *General report 1997 ...*, op. cit., p. 57.

<sup>132</sup> Wijayatilake and Zackariya, op. cit., p. 24.

**Irish Business and Employers Confederation:  
Dealing with sexual harassment in the workplace**

***Training for management and supervisory staff***

Before the policy statement is published to staff generally, it is advisable that members of management and supervisory staff should be made aware of the terms of the policy statement and of the employer's commitment to the policy contained in the statement. This should be accompanied by appropriate training and advice for management and supervisory staff in order to:

- ensure consistent attitudes towards the problem,
- ensure that complaints are dealt with through the grievance procedures to prevent the occurrence or recurrence of sexual harassment in the areas under their direct supervision or general control.

Management and supervisory staff should, once it has been communicated to staff, be prepared to deal with any complaints which might arise at an early stage. Lack of preparation could undermine the effectiveness of the policy.

Source: IBEC Personnel Policies and Procedures, Guideline 4.

## Research

Research commissioned by governments, trade unions, employers and NGOS has been indispensable in revealing the extent of sexual harassment and reviewing the efficacy of existing policies. In Argentina, for example, the Civil Service Union (UPCN) edited a book on the problem. In Spain, the Pandora Project was initiated in 1998 to analyse the origins and forms of sexual harassment with the ultimate aim of making proposals to combat it.<sup>133</sup> Government, trade unions, employers and national experts have been involved, and the work has been carried out in conjunction with the Swedish LO Union and the Irish Confederation of Trade Unions. In the United Kingdom, the national employers' and workers' confederations — the Trade Unions Congress (TUC) and the Confederation of British Industry (CBI) — supported a survey on the costs of bullying at work, funded by the British Occupational Health Research Foundation (BOHRF), which took into account the effects of sexual harassment.<sup>134</sup> In the Philippines, the Manggagawang Kababaihang Mithi ay Paglaya (MAKALAYA), an organization representing women workers in the formal and informal sectors, has conducted a research project on harassment, producing a book describing its findings, a primer on sexual harassment and a poster demanding that it be stopped.<sup>135</sup>

## Legal initiatives

It has become relatively common for the social partners, advocacy and community groups, and even government agencies to advocate legal change to combat sexual harassment. The Icelandic Office for Gender Equality, for example, produced a report on

<sup>133</sup> European Commission, *General report 1998 ...*, op. cit., p. 113, available at <http://europa.eu.int>.

<sup>134</sup> H. Hoel and C.L. Cooper: *Destructive conflict and bullying at work* (Manchester, Manchester School of Management, April 2000), available at [www.le.ac.uk/unions/aut/umist1.pdf](http://www.le.ac.uk/unions/aut/umist1.pdf).

<sup>135</sup> Ursua, op. cit., p. 37.

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sexual harassment at the workplace in 1998, which concluded that it was a much more significant problem than had previously been assumed. In light of this finding, it proposed legislation to prohibit sexual harassment in all its forms and to serve as a basis for further action at workplace level. Other agencies, too, have actively campaigned for legal reform, usually for the enactment or revision of legislation. In Chile, the National Women's Service (SERNAM) has advocated the enactment of legislation for a number of years. In the United Kingdom, the Equal Opportunities Commission published a consultation document in 1998, proposing legislative change.<sup>136</sup> In Norway, the Gender Equality Ombudsman has also proposed legislative amendments in this area. In addition, trade unions and NGOs have initiated campaigns for legislation on sexual harassment. In Spain, the Women's Secretariat of the Trade Union Confederation of Workers' Committees has demanded legislative changes. Increasingly, too, unions are initiating or intervening in litigation in order to enforce and enhance workers' legal rights, including in sexual harassment cases. Recently in Greece, for example, trade unions were involved in two cases which sought to ensure the judicial recognition of sexual harassment. In one, the General Confederation of Labour intervened on behalf of the claimant. Similarly, in India, NGO intervention in the leading Supreme Court case of *Vishaka* helped to prohibit sexual harassment for the first time and develop detailed guidelines to be followed by employers.

## Conclusion

In addition to their role in respect of the legal measures discussed in the preceding chapter, governments, employers' and workers' organizations, and NGOs are taking a number of other kinds of action to combat sexual harassment and help its victims. It is common, for example, for governments to introduce internal policies to cover their own workers, thereby setting an example to other employers. Some governments have introduced codes of practice containing guidelines which, although not binding on employers, may be influential. Many provide guidance on developing measures to respond to sexual harassment in the workplace and offer counselling to workers who have been targeted. Awareness-raising and training on the existence of sexual harassment, the most effective ways to prevent it, and the content and implications of any legal measures are also common. In addition, in some countries, ILO constituents and NGOs concerned with workplace and women's issues may also play a significant role through their research on sexual harassment, advocacy for legislative change and involvement in litigation.

<sup>136</sup> Equal Opportunities Commission: *Equality in the 21<sup>st</sup> century: A new sex equality law for Britain* (London, 1998).





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## V. Workplace policies and procedures

While legal measures can redress complaints and play some part in the prevention of sexual harassment, the primary preventive role belongs to workplace policies and complaints procedures. It is significant, then, for the goal of eradicating sexual harassment, that it appears that an increasing number of policies are being introduced in organizations across the world. Moreover, an analysis of these policies and procedures reveals an emerging consensus on the provisions to be included and the most effective ways of implementing them. This chapter reviews the role of workplace-level policies in preventing sexual harassment through examining a range of policies, and guidance on their content, developed by governments and workers' and employers' organizations. In Part 1, the role of enterprise policies and the extent to which they are being adopted worldwide are examined. Part 2 discusses the primary elements of an effective sexual harassment policy.

### Part 1: The role and extent of workplace policies

#### *The preventive role of workplace policies*

Effective legal remedies are necessary. However, the main aim of most victims of sexual harassment is not to sue their employer for damages, but that the offensive behaviour should stop, that it should not recur and that they should be protected against retaliation for having brought a complaint. Therefore, the most effective way to deal with sexual harassment is to develop and implement a preventive policy at enterprise level.

Source: M. Rubenstein: "Dealing with sexual harassment at work: The experience of industrialized countries", in *Conditions of Work Digest: Combating sexual harassment at work*, Vol. 11, No. 1, 1992, p. 17.

Workplace-level policies and procedures on sexual harassment exist alongside national legal prohibitions, reinforcing and building on them. In legal systems which prohibit sexual harassment, employers are often subject to a positive duty to prevent it. Some legislation sets out detailed provisions enumerating the actions employers must take to prevent harassment and the procedures they must introduce. In those which proscribe sexual harassment without detailed guidelines, employers can still be held liable for conduct which takes place on their premises or is perpetrated by their employees. In jurisdictions in which there are no legal measures prohibiting sexual harassment, policies and procedures at workplace level are especially important. In organizations in which no policies have been introduced, there may be some opportunity for victims to seek relief. In some instances, unions have taken *ad hoc* action on receiving a complaint and managed to achieve some kind of recognition of the problem and redress for the victim, including in countries in which sexual harassment policies are not widespread. There are reports from Bangladesh, for example, of a manager being suspended after a trade union complained of harassment;<sup>137</sup> while in Sri Lanka, trade unions have pursued harassment complaints reported to their district or head offices, although they have proved less likely to take up cases reported at field level.<sup>138</sup> In Nepal, in some cases where complaints have been made to trade unions, they have managed to secure compensation for the victims.<sup>139</sup> While

<sup>137</sup> Huda, op. cit., p. 13.

<sup>138</sup> Wijayatilake and Zackariya, op. cit., p. 26.

<sup>139</sup> S. Pradhan-Malla: *Sexual harassment at the workplace in Nepal*, unpublished report commissioned for the ILO/Japan Regional Tripartite Seminar on Action against Sexual Harassment at Work in Asia and the Pacific, Penang (Malaysia), 2-4 October 2001, p. 47.

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necessary, and perhaps the only recourse available to the victim, these kinds of action are unlikely to provide the procedural protections for complainants available under a sexual harassment policy. In India, for example, there are reports of a reluctance to complain among victims of sexual harassment due to the fear that they will lose their jobs, fail to have their concerns taken seriously, or be the subject of retaliation.<sup>140</sup> Nor can *ad hoc* measures contribute to the same degree as enterprise-level policies to creating an environment in which sexual harassment is discouraged.

The advantage of workplace mechanisms over legislation is that their role is primarily preventive. Rather than being confined to responding to sexual harassment, they are intended to ensure that it does not take place. Effective workplace policies protect employees by dissuading potential harassers, and identifying and responding to harassing behaviour in its early stages. In addition, well-functioning complaints procedures mitigate the likelihood of targets of harassment being forced to resort to the legal process. In those jurisdictions in which sexual harassment laws have not so far been enacted and the courts reluctant to extend sex discrimination protection to cover it, organizational policies are the only channel available to victims seeking redress. Even in countries in which the sexual harassment laws are comprehensive and function effectively, however, workplace policies remain a useful preventive tool and shield victims of harassment from the often stressful, time-consuming and costly process of bringing a legal action.

Effectively communicated and implemented policies have also been found to encourage victims of harassment to report their experience to their employers. Research demonstrates that very few victims of workplace sexual harassment take any formal action for reasons which include ignorance of the routes available to them and a lack of confidence that their organization will adequately respond to their plight.<sup>141</sup> Moreover, the low rates of reporting are significant, not only to the individual directly concerned, but also to the employer, who may erroneously conclude from a lack of complaints that there are few incidences of sexual harassment in the workplace. Although the effects of different kinds of policies have not been extensively examined, the available research indicates that having a policy in place significantly increases the likelihood that victims of harassment will make a complaint. It appears that an effective way of encouraging workers to report sexual harassment is to introduce a variety of policies. In these circumstances, victims are more likely to have confidence their employer will respond to complaints.<sup>142</sup>

<sup>140</sup> The Lawyers Collective, op. cit., Section 2.3, Box 2.5.

<sup>141</sup> Studies from the United States and Canada demonstrate that only around 10 per cent to 20 per cent of victims report harassment to someone in authority in their organization. Instead, they tend to ignore the harassment, deflect it by treating it as a joke or by going along with it, or attempt to avoid the harasser. S. Welsh: "The multidimensional nature of sexual harassment: An empirical analysis of women's sexual harassment complaints", *Violence Against Women*, Vol. 6, 2000, p. 118. Similarly, a review of research conducted in 11 northern European countries found that most employees responded by ignoring the behaviour or asking the perpetrator to stop. They feared the negative consequences of responding in other ways, believed their complaints would not be taken seriously, or were too surprised to take any other action. Very few filed complaints. "Sexual harassment in European workplaces", in European Commission: *Sexual harassment at the workplace in the European Union* (Luxembourg: Office for Official Publications of the European Communities, 1999), p. 5.

<sup>142</sup> M.P. Rowe: "Dealing with harassment: A systems approach", in M.S. Stockdale (ed.): *Sexual harassment in the workplace* (Thousand Oaks, CA, Sage, 1996), p. 241; and C.L.Z. DuBois, R.H. Faley, G.A. Kustis and D. Erdos Knapp: "Perceptions of organizational responses to formal sexual harassment complaints", in *Journal of Managerial Issues*, Vol. 11, 1999, p. 198.

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In addition to the advantages which accrue to victims of harassment, there are a number of beneficial consequences for employers who implement anti-harassment policies. First, given that sexual harassment has a discriminatory impact on female employees, introducing a policy enables employers to highlight their commitment to equal opportunities for women workers. In addition, preventing sexual harassment may enhance productivity. Targets of harassment tend to be unable to concentrate on their work, have low morale and lack motivation.<sup>143</sup> Some become ill as a result of their experiences. These problems can result in absenteeism and high staff turnover, a loss of efficiency and productivity, and growing costs of sick pay or medical insurance. Sexual harassment can also damage an enterprise's image and reputation. Finally, employers can ensure that, by way of their sexual harassment policies, they are in compliance with legal requirements and thereby avoid defense costs and compensation awards.

### ***Additional methods of preventing sexual harassment***

This chapter focuses exclusively on policies developed to prevent sexual harassment and respond to complaints. Many enterprises, however, implement these kinds of policies alongside broader measures aimed at integrating women into their workforces. The procedures documented in the rest of the chapter are primarily individualized methods of attacking sexual harassment and, as such, do not address the circumstances from which it emerges, including the isolation of women in male-dominated fields and disparaging attitudes towards them.

A European Union study has highlighted a growing consensus that the characteristics of an organization are a critical influence on whether its workers will be sexually harassed.<sup>144</sup> In the organizations surveyed, organizational climate emerged as a primary explanatory variable in the varying incidence rates of sexual harassment. This research reinforces previous studies, which show that sexual harassment is more prevalent in sexualized work environments, and those in which it is tolerated, rather than in organizations characterized by a positive social climate and sensitivity to the problems which can be encountered by women workers. Enterprise policies designed to integrate women into non-traditional jobs and ensure a supportive working environment are, then, a valuable accompaniment to sexual harassment policies.

### ***The extent of enterprise policies***

From the limited information available, it appears that the number of employers who have introduced policies on sexual harassment has increased over the last decade, at least in industrialized countries. A small-scale survey from the United Kingdom, for example, revealed a trend towards introducing sexual harassment policies during the 1990s.<sup>145</sup> Figures from Japan show that, since the amendment of its equality law to extend to sexual

<sup>143</sup> See Chapter I.

<sup>144</sup> European Commission, *op. cit.*

<sup>145</sup> In an *IRS Employment Trends* survey of 1996, almost three-quarters of the 65 organizations surveyed stated that they had introduced sexual harassment policies, compared to one-third in a similar survey conducted in 1992. In the private sector, the number of organizations operating policies had increased from 20 per cent to 65 per cent over the same four-year period. "Sexual harassment at work 1: Incidence and outcomes", in *IRS Employment Trends*, No. 615, 1996, p. 4.

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harassment, many employers have adopted measures.<sup>146</sup> Even in those sectors in which women have traditionally been under-represented and in which sexual harassment policies were previously rare, there appears to be growing concern about providing mechanisms to combat workplace sexual harassment.<sup>147</sup> And in countries in which few policies had previously been introduced, there are signs that some employers are taking action. In the Republic of Korea, for instance, the Kumho Business Group introduced in-house regulations in 1995; in Nepal, the Hyatt Regency Hotel included sexual harassment as a ground for action in its disciplinary policy.<sup>148</sup> Sexual harassment has also been proscribed as a type of misconduct subject to disciplinary measures in the public sector in both India and Zimbabwe. Multinational corporations appear to be particularly likely to introduce policies across the countries in which they operate, even where, as in China, these kinds of initiatives are relatively rare.<sup>149</sup>

There are also indications however that, while a significant number of employers are making efforts to develop policies and procedures, many are neglecting to introduce them or failing to implement them effectively. A survey in Ireland, for example, found that only half of its state-sponsored bodies had guidelines for dealing with sexual harassment.<sup>150</sup> There are also low levels of compliance with the Anti-Sexual Harassment Act in the Philippines, where in 1998 only half of private sector employers have introduced a policy.<sup>151</sup> Even in organizations in which policies have been developed, it is possible that many are not effectively implemented. A study conducted by the European Union concluded that, although employers in the 11 countries in which the research was carried out<sup>152</sup> had taken the initial steps — devising a policy, setting up a policy structure, publishing policy statements — many did not provide regular information; had few facilities in place; had failed to establish grievance commissions; and often did not consider themselves responsible for the incidence of sexual harassment in their establishments.<sup>153</sup>

<sup>146</sup> A survey conducted in 1999 by the Japan Institute of Workers' Evolution found that 70.9 per cent of respondent companies with 1,000 or more employees had implemented sexual harassment measures. Yamakawa, op. cit., p. 7.

<sup>147</sup> See, for example, J.A. Stead: "Sexual harassment in the construction industry", in L. Geller-Schwartz (ed.): *From awareness to action: Strategies to stop sexual harassment in the workplace* (Ottawa, Minister of Supply and Services Canada, 1994), p. 104 [discussing the emergence of sexual harassment policies in the construction industry in Canada].

<sup>148</sup> Pradan-Malla, op. cit., p. 53.

<sup>149</sup> Tang, op. cit., paragraph 46.

<sup>150</sup> Fifty-one per cent of a total of 82 state-sponsored bodies surveyed had no policies. The proportion of state bodies with written sexual harassment guidelines had increased from 35 per cent in 1990. Department of Justice, Equality and Law Reform: *Equal opportunities in the state-sponsored sector: Report on a survey of equal opportunities in the state-sponsored sector* (Dublin, Stationery Office, 1999).

<sup>151</sup> Ursua, op. cit., p. 14, citing a survey by the Employers' Confederation of the Philippines (ECOP) conducted in 1998.

<sup>152</sup> Austria, Belgium, Denmark, Finland, Germany, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

<sup>153</sup> European Commission, *Sexual harassment in European workplaces*, op. cit., p. 35.

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## **The role of employee representatives**

Many of the measures discussed in Part 2 have been adopted unilaterally by employers. Others, however, were drawn up in conjunction with trade unions or employee representatives. In fact, as discussed in more detail later in this chapter, employees and their representatives can be involved throughout the whole process — devising the policy, disseminating it to the workforce, administering the complaints procedure, conducting training and monitoring the results. In some countries, it is common for sexual harassment policies to be negotiated during collective bargaining and included in collective agreements. Indeed, in jurisdictions in which legislative measures are sparse or non-existent, collective agreements may be the main form of protection. In some countries, the involvement of workers or their representatives is required by legislation. Their participation may not always be realized in practice, however. In the Philippines, where the Anti-Sexual Harassment Act provides for union involvement in developing and administering policies, research has revealed that in many of the organizations which have a policy, they were drafted solely by the employer.<sup>154</sup> In Malaysia, although its Code of Practice recognizes the role of unions, some firms have failed to consult on training programmes, as suggested by the Code.<sup>155</sup>

In other countries, collective agreements build on the legal provisions by establishing policies and procedures suited to the size and nature of individual enterprises. Sectoral- and enterprise-level collective agreements have drawn on legislation in the Netherlands. In Australia, unions are widely involved in negotiating sexual harassment clauses to be included in enterprise agreements, and the number of anti-discrimination and sexual harassment clauses included in certified agreements has increased in recent years.<sup>156</sup> At the industry level, the maritime workers' and employers' organizations jointly designed a sexual harassment policy for the industry, which was introduced in 1996.<sup>157</sup> In Japan, where legislation enacted in 1997 bans sexual harassment in the workplace, the union and management of the *Daiei*, one of the largest supermarket chains, have signed an agreement articulating in detail the employer's responsibility for the prevention of harassment.<sup>158</sup> Even in firms and sectors in which policies are sparse, unions may be able to play a role in combating harassment. In India, for example, they have acted as a complaints mechanism by negotiating with employers in small private-sector firms and in the unorganized sector, in which formal policies for tackling sexual harassment are virtually non-existent.<sup>159</sup>

<sup>154</sup> Ursua, op. cit., p. 17.

<sup>155</sup> M.K. Zaitun: *Action against sexual harassment in the workplace: Asian women's perspective*, unpublished report commissioned for the ILO/Japan Regional Tripartite Seminar on Action against Sexual Harassment at Work in Asia and the Pacific, Penang (Malaysia), 2-4 October 2001, p. 42.

<sup>156</sup> N. Ruskin and C. Sutherland: *Action against sexual harassment at work in Australia*, unpublished report commissioned for the ILO/Japan Regional Tripartite Seminar on Action against Sexual Harassment at Work in Asia and the Pacific, Penang (Malaysia), 2-4 October 2001, Section 2(c).

<sup>157</sup> *ibid.*, Section 4.

<sup>158</sup> "Measures to prevent sexual harassment in the workplace", in *Japan Labor Bulletin*, No. 2, August 1999, p. 3.

<sup>159</sup> The Lawyers Collective, op. cit., Section 7.3.

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## Part 2: The elements of effective policies and procedures

Sexual harassment policies are often part of an organization's policies on equality or on the whole range of forms of harassment, violence and bullying at work. The context in which a sexual harassment policy is situated can depend to some degree on the legal system in which the employer operates. At Bell Canada, for example, sexual harassment was introduced into the human rights policy, which explicitly referred to the prohibition of sexual harassment by the federal Human Rights Act.<sup>160</sup> The sexual harassment education programme at the American chemical company DuPont stemmed initially from a personal safety programme.<sup>161</sup>

There are some obvious advantages to situating sexual harassment measures within a broader policy framework. Integrating harassment into an organization's policies on equality, for example, serves to highlight its discriminatory effects on women. Dealing with it as one of the many forms of workplace harassment emphasizes the range of unacceptable behaviour to which employees can be subjected in their places of work. It is also an approach with the potential to cover a broad range of the forms which sexual harassment can take. And there is an argument for establishing a single procedure for all kinds of harassment, discrimination and human rights abuses, to avoid confusion among employees as to the appropriate action to take. Many employers, however, have found it most effective to develop distinct procedures for dealing with sexual harassment, even where it forms part of a more wide-ranging workplace policy.

Workplace sexual harassment policies aim both to respond to incidents of sexual harassment and prevent their recurrence. Their details vary depending on the nature, location and size of the employer, and there are no universally accepted procedures for implementing them. However, many similarities are emerging, and a number of elements are included in many policies: a policy statement, a complaints procedure, remedial measures, training, and monitoring and evaluation. Moreover, a number of issues of importance in workplace policies — such as how to define sexual harassment and identify its perpetrators — also arise with respect to legal measures and have been discussed in that context in Chapter III.

### The policy statement

The first step in developing an effective policy on sexual harassment is to devise a policy statement which prohibits sexual harassment and, usually, defines the conduct to which it applies. Policy statements also often contain a statement of intention, for example, that sexual harassment will be eradicated or that the policy will be strictly enforced. A number of employers have attempted to convey that incidents of sexual harassment will be taken seriously by the organization by issuing a statement in unambiguous language that sexual harassment will not be tolerated under any circumstances. In the United States, these kinds of policy statements have become known as “zero tolerance policies” and have been adopted by a number of large employers, including CompUSA, Texaco and the US Postal Service.<sup>162</sup> DuPont, for example, introduced a policy entitled “Zero People

<sup>160</sup> M. Gallant: “A cooperative approach to combating sexual harassment in the workplace”, in Geller-Schwartz, op. cit., note 159, p. 75.

<sup>161</sup> G. Flynn: “DuPont's formula for a harassment-free workplace”, in *Human Resource Management International Digest*, Vol. 6, No. 3, May-June 1998, p. 13.

<sup>162</sup> S. Greengard: “Zero tolerance: Making it work”, in *Workforce*, Vol. 78, No. 5, May 1999, pp. 28-34.

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Treatment Incidents” in 1997, which states that the company will not tolerate harassment, discrimination or oppression against any of the groups protected under its equal employment opportunity/affirmative action statement. Enterprises can also indicate the seriousness with which they intend to respond to sexual harassment by issuing the statement through a member of senior management, underscoring that the issue is of significance to those at the highest levels of the organization. In 1997, the CEO of the Ford Motor Company issued a communication to its employees worldwide entitled “Zero Tolerance of Harassment”, in which he emphasized both the company’s and his personal commitment to zero tolerance of sexual harassment and warned that breaches of the policy would be treated as serious misconduct.<sup>163</sup> In Australia, the federal Human Rights and Equal Opportunity Commission’s (HREOC) code of practice on sexual harassment in the workplace recommends that policies contain a strong statement on the attitude of the employer towards sexual harassment; a reminder that it is illegal; and an indication of the organization’s objectives.<sup>164</sup> This advice is reflected in many policies, including that of the Paraplegic and Quadriplegic Association of Australia, which makes clear the Association’s commitment to ensuring their workplaces are free of harassment.<sup>165</sup>

Policies which are limited to this kind of statement, however, may not have the desired effect, no matter how strongly worded. It appears from the research reviewed by the European Commission study that policies are most effective when they contain detailed provisions.<sup>166</sup> Many organizations include in their statements a full description of what will be taken to constitute sexual harassment, including examples. Often they detail the responsibilities of managers and supervisors to implement the policy and the rights of employees who are subjected to or witness sexual harassment. Some aim to be very practical by indicating the individuals to whom complaints can be made, including their contact details, and an assurance that they can be reached at any time. The more comprehensive policy statements also include a detailed description of the complaints procedure and the manner in which any investigation will be conducted. Finally, it is common for policy statements to outline the range of sanctions which can be applied, making potential harassers aware of the penalties and allowing victims a realistic expectation of the outcome of their complaint.

The remainder of this section discusses a number of elements of the policy statement which are particularly important: the definition of sexual harassment; the identity of the harasser; the identity of the victim; and the location of the harassment.

### Definition of sexual harassment

Advice on devising effective policy statements generally includes that they should include a comprehensive and clear definition of sexual harassment and a description of the kinds of conduct covered.<sup>167</sup> This approach allows both targets and potential harassers to know precisely the kinds of behaviour which are prohibited. At the workplace level, given the preventive role of the policy, it is particularly important to have as clear-cut as possible

<sup>163</sup> Reproduced in A. Reinhart: *Sexual harassment: Addressing sexual harassment in the workplace — A management information booklet* (Geneva, ILO, 1999), p. 9.

<sup>164</sup> Available at [www.hreoc.gov.au/sex\\_discrimination/code\\_practice/SH\\_codeofpractice.pdf](http://www.hreoc.gov.au/sex_discrimination/code_practice/SH_codeofpractice.pdf).

<sup>165</sup> Ruskin and Sutherland, op. cit., Section 2(d).

<sup>166</sup> European Commission, *Sexual harassment in European workplaces*, op. cit., p. 40.

<sup>167</sup> See, for example, the guidelines issued by the US Equal Employment Opportunities Commission, op. cit.



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a definition of what constitutes sexual harassment. The definitions used in policies vary as to whether they include both sex-based and sexual behaviour; distinguish between *quid pro quo* and hostile working environment sexual harassment; ground the definition of proscribed behaviour in its unwelcomeness to the recipient or in its effect on the dignity of the employee; and embody a standard of reasonableness.

The most comprehensive policies include both sex-based and sexual conduct. Suffolk County Council, a local government employer in the United Kingdom, introduced a sexual harassment policy in 1995, which referred to “unwanted conduct of a sexual nature, or other conduct based on sex”.<sup>168</sup> Others distinguish sexual harassment and gender harassment and explicitly prohibit both.<sup>169</sup> It is also common for policies to contain definitions which refer to *quid pro quo* and hostile working environment harassment. The University of Cape Town, South Africa, for instance, prohibits both.<sup>170</sup> It distinguishes between situations in which “submission is made either explicitly or implicitly a term and condition of an individual’s employment” and those in which “its purpose or effect is interference with the individual’s performance at work ... by creating an intimidating, hostile or offensive environment in which to work”. The policy of Flinders University in Australia defines sexual harassment as “any unwanted, unwelcome or uninvited behaviour of a sexual nature” and makes reference both to behaviour which creates a hostile working environment, and to the making of promises or threats to elicit sexual favours.<sup>171</sup> The policy at Zanussi, the Italian subsidiary of the Swedish manufacturer Electrolux, singles out *quid pro quo* harassment as particularly serious.<sup>172</sup> Its definition of this form of harassment is extensive in that it includes harassment not only by those in a superior position, but also by colleagues who have influence on the phase prior to the establishment of an employment relationship, on recruitment, and on the termination of employment.

Many policies state that sexual harassment is behaviour unwelcome to its recipient. The need to preserve the dignity of employees is also emphasized explicitly in a number of policies. The policy introduced in 1996 at Volkswagen AG, for example, states that the dignity of employees, their privacy, and their health are jeopardized by sexual harassment.<sup>173</sup> The collective agreement which covers the Italian supermarket chain Euromercato refers to creating a working environment which recognizes the freedom, dignity and inviolability of each worker and to upholding the principle of courtesy in interpersonal relations.<sup>174</sup> Many policies also incorporate a standard of reasonableness, defining sexual harassment as behaviour which would be found unacceptable by the reasonable person. The policy of the Canadian food retailer and distributor, National Grocers, reflects a number of North American policies in that it embodies both

<sup>168</sup> “Tackling harassment at Suffolk County Council”, in *IRS Employment Trends*, No. 629, April 1997, p. 6.

<sup>169</sup> Available at [www.uct.ac.za/uct/policies/harassment.pdf](http://www.uct.ac.za/uct/policies/harassment.pdf).

<sup>170</sup> *ibid.*

<sup>171</sup> Available at [www.flinders.edu.au/ppmanual/EqualOpportunity/sexharass.html](http://www.flinders.edu.au/ppmanual/EqualOpportunity/sexharass.html).

<sup>172</sup> Reproduced in “Zanussi pioneers worker participation”, in *European Industrial Relations Review*, No. 292, May 1998, p. 18.

<sup>173</sup> The policy states that sexual harassment is an “infringement of human dignity and a violation of personal privacy”. It also notes that it creates a “confining, stressful and degrading working and learning environment within the company” and can have a negative effect on the health of employees. Reproduced in Reinhart, *op. cit.*, p. 30.

<sup>174</sup> *European Industrial Relations Review*, No. 306, 1999, p. 19.

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unwelcomeness and unreasonableness. Under this policy, sexual harassment will be considered to have taken place “if a reasonable person ought to have known that such behaviour was unwelcome”.<sup>175</sup>

Workplace policies, in contrast to most legislative provisions, tend to illustrate and build upon their definitions by referring to a range of examples of behaviour, although cautioning that sexual harassment is not restricted to the illustrations. The Telecom Eireann policy cites a variety of examples, ranging from unnecessary touching, to gesturing of a sexual nature, unwelcome sexual advances, demands for sexual favours, and leering or whistling.<sup>176</sup> The Civil Service Conduct Rules in India follow this model, by incorporating a list of behaviour including physical contact and advances, demands or requests for sexual favours, “sexually coloured” remarks, and “any other unwelcome physical, verbal or non-verbal conduct of a sexual nature”.<sup>177</sup> The element of intention is also dealt with explicitly in some policies. The Volkswagen policy states that it is up to the subjective opinion of the victim to decide whether an action constitutes sexual harassment.<sup>178</sup> Most organizations seem to agree that certain of the more egregious forms of conduct, including physical violence and touching intimate parts of the body, should be prohibited outright and these incur their most stringent penalties. It is also a widespread practice for policies to ban the display of sexually explicit or suggestive materials. The equal opportunity policy of the Toyota Motor Corporation in Australia, for instance, defines non-verbal harassment to include “displays of obscene or pornographic photographs, pictures, posters, electronic mail, reading matter, objects, or displaying material on VDU screens”.<sup>179</sup> In India, too, the Civil Service Conduct Rules prohibit the display of pornography.

Recently, with the growing awareness of the role that the Internet and e-mail can play as tools of harassment, employers have responded either by incorporating references to these forms of behaviour in sexual harassment policies or by referring to it in the company policy on computer or Internet usage. In Australia, the Toyota Motor Corporation has introduced an equal opportunity policy that includes a prohibition on using its electronic communications systems (Internet, Intranet, e-mail, telephone) in violation of its equal opportunity or sexual harassment policies.<sup>180</sup>

### Identify of the perpetrator

Enterprise policies often recognize that harassment is perpetrated not only by employees, but can include conduct by third-parties such as customers, contractors and clients. Harassment by third parties can inevitably be difficult to tackle, since the perpetrator does not work for the victim’s employer. Some organizations, however, have attempted to address this form of harassment. The Japanese National Personnel Authority has adopted rules prohibiting the sexual harassment of civil servants, which apply to both

<sup>175</sup> R. Conliffe: “National Grocers’ workplace harassment policy”, in Geller-Schwartz, op. cit., note 159, p. 88.

<sup>176</sup> Reproduced in *European Industrial Relations Review*, No. 289, 1998, p. 14.

<sup>177</sup> Rule 3-C.

<sup>178</sup> Reinhart, op. cit., p. 30.

<sup>179</sup> Reproduced in Ruskin and Sutherland, op. cit., Appendix 5.

<sup>180</sup> *ibid.*

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contract workers and visitors to government offices. In Germany, Volkswagen applies its policy to the employees of other organizations who work at the company.<sup>181</sup>

In addition to ensuring that a wide range of potential harassers are covered by the policy, certain organizations have been innovative in attempting to level the playing field between target and harasser. Their policies indicate that harassers will be appropriately disciplined, irrespective of their role in the organization. The policy of the Katz Media Group in the United States, for instance, states that the company encourages reporting of all incidents of sexual harassment “regardless of who the offender may be”.<sup>182</sup> The University of South Australia recognizes that incidents of this nature are particularly common, noting that sexual harassment most frequently occurs in relationships of unequal power or authority (see box below).<sup>183</sup> Since victims whose occupational status is below that of the perpetrator may be less likely to perceive the organizational response as favourable, the inclusion of this kind of statement may be useful.<sup>184</sup>

### Identify of the victim

In identifying who will be considered a victim of harassment, some organizations have reacted to the increasing awareness of the possibility of harassment of male workers and same-sex harassment by recognizing and prohibiting both these forms of behaviour. Coverage of both men and women can be effected implicitly through the adoption of sex-neutral language (“all employees” or “all persons”). Alternatively, some policies explicitly state that harassment can be perpetuated against both. The Japanese National Personnel Authority’s rules on the prevention of sexual harassment, for example, extend beyond the national legislation’s coverage of female employees and explicitly protect men.<sup>185</sup>

The University of South Australia covers same-sex harassment. This policy is also innovative in that it explicitly recognizes that some groups among women are more likely than others to be subjected to sexual harassment in the workplace, and identifies those who may be particularly vulnerable (see box below).

<sup>181</sup> *European Industrial Relations Review*, No. 288, 1998, p. 29.

<sup>182</sup> Reproduced in Reinhart, op. cit., p. 23.

<sup>183</sup> University of South Australia: *Sexual harassment policy* (revised to 18 May 2004), available at [www.unisa.edu.au/adminfo/policies/corp/c12.htm](http://www.unisa.edu.au/adminfo/policies/corp/c12.htm).

<sup>184</sup> C.L.Z. DuBois, R.H. Faley, G.A. Kustis and D.Erdos Knapp: “Perceptions of organizational responses to formal sexual harassment complaints”, in *Journal of Managerial Issues*, Vol. 11, No. 2, Summer 1999, p. 198.

<sup>185</sup> Yamakawa, op. cit., p. 18.

**University of South Australia:**  
**Sexual harassment policy and grievance procedure**

Sexual harassment most often occurs in relationships of unequal power or authority, although it may also take place between peers. In providing a working and learning environment free of harassment it is important to recognize that certain groups may be particularly vulnerable, including:

- indigenous women
- people from non-English-speaking backgrounds
- people with disabilities
- people working or learning in non-traditional areas
- women working in isolated areas.

Available at [www.unisa.edu.au/admininfo/policies/corp/c12.htm](http://www.unisa.edu.au/admininfo/policies/corp/c12.htm).

Many employers extend their policies to the harassment of non-employees by their own workers, allowing outsiders to make complaints about behaviour they were subjected to by an employee, enabling the company to become aware of workers who are engaging in sexually harassing behaviour on their premises or during working hours. This outcome can again be achieved implicitly through the use of inclusive language, but is also explicit in some policies.

### Location of the harassment

Since workplace sexual harassment may occur outside the premises of the employer — at conferences, on business trips or at company-sponsored social events — organizations often indicate the locations in which their policies will be applicable. Northern Foods' policy, for example, emphasizes that harassment is "equally unacceptable" at company training, social and sporting events outside the workplace.<sup>186</sup> Similarly, the United States Navy policy notes that the work environment to which it applies includes any location where personnel are engaged in official business and to related social, recreational and sporting events, regardless of their location.<sup>187</sup> The Policy of Flinders University specifically extends to cover staff and students engaged in activities "reasonably connected with their role at the University". These include field trips, field work and social activities, even if they take place beyond the university campus.<sup>188</sup> A related issue of concern for enterprises that contract with suppliers and subcontractors is whether their sexual harassment policies will extend to these bodies. The clothing retailer, Hennes and Mauritz, has stated that its code of conduct, which contains provisions on sexual harassment, should in principle be followed by its suppliers and subcontractors.<sup>189</sup>

### ***Dissemination of the policy***

Policy statements appear to be useful in preventing some forms of sexual harassment, particularly those which involve kinds of behaviour not aimed at specific individuals, such

<sup>186</sup> Reproduced in Reinhart, op. cit., p. 26.

<sup>187</sup> Available at [www.bupers.navy.mil/pers00h/files/Policies/s530026c.pdf](http://www.bupers.navy.mil/pers00h/files/Policies/s530026c.pdf).

<sup>188</sup> Reproduced in Ruskin and Sutherland, op. cit., Appendix 4.

<sup>189</sup> Available at [www.hm.com/corporate/pdf/code\\_of\\_conduct/Engelsk.pdf](http://www.hm.com/corporate/pdf/code_of_conduct/Engelsk.pdf).

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as offensive comments about women in general, or the display of sexually suggestive or explicit material. However, it has been found that merely issuing a policy statement does not deter more personalized forms of sexual harassment, such as physical aggression or sexual comments directed at individual workers. To prevent these kinds of conduct, it has been suggested that organizations must make more visible efforts by implementing proactive measures to ensure that workers are aware of the policies and procedures in place.<sup>190</sup> This result can be achieved by ensuring that responsibility for enforcing the policy is appropriately allocated, developing an effective complaints mechanism and applying it, and providing training, all of which are discussed below. The first step, however, is to disseminate the policy effectively, in order to ensure that every member of the organization is aware of its content and of how to initiate a complaint.

There is a wide range of methods through which sexual harassment policies can be brought to the attention of employees. Organizations have incorporated them into work rules or company regulations. They can also be reproduced and reviewed in enterprise newsletters and personnel magazines. Often, new policies are set out in, or accompanied by, circulars or memoranda from members of senior management addressed to line managers or distributed to individual employees. In order to indicate the significance of the policy and ensure that new employees become aware of it as soon as possible, it can be distributed to all entrants, as recommended by the Australian HREOC Code of Practice.<sup>191</sup> It can, for example, be reproduced in personnel manuals or handbooks distributed to all entrants or included in job descriptions. The policy can then be reinforced through discussions in work meetings and training sessions and posting in a conspicuous place. These kinds of regular communication of sexual harassment policies are useful in ensuring that their provisions are not forgotten.

Many companies reproduce their sexual harassment policies in leaflets or brochures which are then distributed to all employees. Another widely adopted mechanism to encourage workers to read the policy is to ask them to sign a statement indicating that they have read and understood it. Increasingly also, sexual harassment policies are disseminated by e-mail or posted on the company intranet. The policy of the Paraplegic and Quadriplegic Association of Australia, for example, is displayed online.<sup>192</sup> Companies can also design a simple, accessible document in addition to their full policy, for ease of understanding by all those who need to be aware of its contents. This approach would be especially appropriate where there is a likelihood that some members of the workforce may have difficulty in reading and understanding the full policy. In these circumstances, training workshops may also be an effective way of conveying information about the policy and the procedures through which it is effected. In addition, as suggested in the HREOC's Code of Practice, policies can be translated into relevant community languages.

### ***Implementation of the policy***

It is apparent that having a policy on sexual harassment, and even ensuring that all employees know of its existence, is insufficient to prevent sexual harassment. Policies must also routinely be applied, and complaints swiftly and effectively addressed. Employee perception of the organization's tolerance of harassment and the employees' beliefs as to the organization's stance on the problem have been found to have more

<sup>190</sup> J.E. Gruber: "The impact of male work environments and organizational policies on women's experiences of sexual harassment", in *Gender and Society*, Vol. 12, 1998, p. 301.

<sup>191</sup> op. cit., [http://hreoc.gov.au/sex\\_discrimination/code\\_practice/SH\\_codeofpractice.pdf](http://hreoc.gov.au/sex_discrimination/code_practice/SH_codeofpractice.pdf).

<sup>192</sup> Ruskin and Sutherland, op. cit., p. 27.

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influence on their attitudes and behaviours than the existence of formal rules and regulations.<sup>193</sup> Consequently, measures must be taken to ensure that policy statements are put into practice. For instance, certain policies hold all members of management responsible for maintaining a harassment-free working environment. Many require that all staff ensure an environment free from sexual harassment, while imposing a specific obligation on managers and supervisors to uphold the policy, rather than confining this role to human resource officers and senior executives. In Canada, for example, a trend has been noted in the banking sector towards introducing policies under which preventing harassment is the direct responsibility of every manager and supervisor.<sup>194</sup> In India, the Central Civil Service Conduct Rules include a provision that every government servant in charge of a workplace should take appropriate steps to prevent sexual harassment.<sup>195</sup> There are also signs of moves being made towards involving employees in ensuring that sexual harassment policies are implemented, including by allowing third parties to complain about conduct they have witnessed. In addition, in some enterprises, the powers accorded to individual victims are particularly extensive, enabling them to deal with sexual harassment immediately of their own accord without prior recourse to official channels. In the Netherlands, for instance, the collective agreement covering social workers in family care provides that employees subjected to sexual harassment may immediately stop work before presenting their complaint to a superior.<sup>196</sup>

### **Complaints procedure**

Until fairly recently, it was common practice to deal with complaints of sexual harassment through ordinary workplace complaints mechanisms, and this remains the approach in many organizations. Experience suggests, however, that addressing sexual harassment claims through unmodified general complaints mechanisms is not the most appropriate way to deal with them. A number of enterprises have introduced procedures devised specifically to respond to the concerns of victims of sexual harassment and the difficulties encountered in investigating these kinds of complaints. The main elements of these procedures are discussed in the remainder of this section.

#### **Initial actions by the complainant**

Sexual harassment policies may require the victim to inform the harasser that the behaviour to which she has been exposed is offensive and unwelcome. Telecom Eireann's policy includes this requirement, providing for a complaint to be brought only where a direct approach is not possible or has been tried to no effect. The policy of the United Nations encourages individuals to notify the offender that the behaviour is unwelcome, but recognizes that "power or status disparities" or other considerations, may make direct confrontation difficult. In these circumstances, the target is encouraged to discuss the matter with a colleague or friend as soon as possible and can report it to one of the designated staff members. Katz Media's policy is sensitive to the difficulty of balancing the advantages of enabling the target to take independent action with the dangers of

<sup>193</sup> C. Hulin, L. Fitzgerald and F. Drasgow: "Organizational influences on sexual harassment", in Stockdale, op. cit., p. 127; and J. Pryor, J. Giedd and K. Williams: "A social psychological model for predicting sexual harassment", in *Journal of Social Issues*, Vol. 51, 1995, p. 69, cited in Gruber, op. cit., note 188.

<sup>194</sup> H. Sinclair: "Sexual harassment policies in Canada's banks", in Geller-Schwartz, op. cit., p. 97.

<sup>195</sup> Provision 3-C.

<sup>196</sup> *European Industrial Relations Review*, No. 289, 1998, p. 15.

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insisting on a direct response to egregious forms of harassment (see box below). The policy also provides that, when direct communication is either ineffective or impossible, the victim can report the sexual harassment complaint.

**Katz Media Group, Inc.:**

**Sexual harassment policy**

While the company encourages individuals who believe they are being harassed to firmly and promptly notify the offender that his or her behaviour is unwelcome, the Company also recognizes that power and status disparities between an alleged harasser and a target may make such a confrontation impossible.

Source: Reproduced in Reinhart, *op. cit.*, p. 24.

## Making a complaint

Traditionally, grievance procedures tend to identify only one person to whom complaints can be made, often the line manager of the complainant. But in sexual harassment allegations this “one channel” approach is often inappropriate. The complainant may not wish to discuss with the manager an incident which could be distressing or embarrassing. He or she may prefer to discuss the complaint with someone of the same sex, which may not be possible where there is only one option. More importantly, it is possible that the designated staff member is the harasser. As a consequence, many sexual harassment policies identify another individual to whom harassment can be reported. The policy of the sports-wear manufacturer Reebok in China, for example, allows victims to report directly to the person in charge rather than to their direct superior.<sup>197</sup> Other policies offer a choice of individuals to whom the harassment can be reported, perhaps including the supervisor, but with additional options such as other managers, representatives of the health and safety or personnel departments, or, where applicable, confidential counsellors, harassment advisers or equality officers. The policy of ABB/Switzerland, for example, allows the complaint to be made to any of its focal points for sexual harassment issues: equal opportunity officers, representatives of the staff association, staff counsellors and members of the personnel department.<sup>198</sup> In a number of countries, it is common for designated union representatives and members of works councils to be available to be contacted about harassment. Many enterprises also attempt to guarantee that the complainant will be able to talk to someone of the same sex by ensuring that the list of designated complaint recipients includes a number of women.

## Informal and formal complaints mechanisms

Sexual harassment policies often provide a complainant with the alternative of using either an informal or formal complaints mechanism. These procedures vary in content, but broadly, informal mechanisms tend to adopt a more conciliatory approach to dealing with incidents of harassment, often through a discussion conducted between the target, the harasser and a facilitator. Formal processes involve a full investigation of the claim, including separate interviews with each party, and culminate in an adjudication of the merits of the claim. Informal mechanisms can be swifter and less stressful for the victim. Where a complainant does not relish the prospect of a formal enquiry and is merely seeking assurance that the offensive behaviour will not be repeated, such an informal approach may be preferable. The Australian HREOC code suggests it is appropriate where the allegations are less serious and where the complainant wishes to use the informal

<sup>197</sup> Tang, *op. cit.*, paragraph 46.

<sup>198</sup> Reinhart, *op. cit.*, p. 17.

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option in order to sustain the working relationship with the alleged harasser.<sup>199</sup> Informal procedures have, however, been criticized as potentially inappropriate in the context of unequal power relations between the parties. Many policies demonstrate awareness of their potential for abuse by allowing individuals to pursue a formal complaint if they are dissatisfied with the outcome of the informal process. At the Kumho business group in the Republic of Korea, for example, the policy designates a mediator to handle complaints, but if a resolution cannot be reached, the complaint is to be referred to a committee.<sup>200</sup>

There appears to be a widespread view that the choice of which complaint mechanism should be adopted — including not only formal and informal internal mechanisms, but references to arbitration, to human rights or equality commissions and civil actions — should be that of the victim. However, it is also clear that, in some situations, it may be in the interests of the company to pursue an allegation, irrespective of whether the victim wishes to initiate a complaint. The policy at Suffolk County Council in the United Kingdom recognizes this contingency. It provides that while, as a general principle, the decision to pursue a complaint should be that of the victim, this principle must be balanced against protecting the general welfare of employees, particularly where complaints involve more serious forms of harassment. In these circumstances, all best efforts should be made by management to ensure that the complaint can be investigated and resolved.<sup>201</sup>

### Counselling and support

Many workplace policies on sexual harassment designate an existing member of staff to act as a counsellor. The titles used and precise roles vary, but generally these counsellors are available to advise victims of harassment, guide them through the process of making a complaint and assist them in resolving it informally. This role is usually filled by personnel managers or health professionals, although occasionally a general manager or employee may be appointed. The Dutch collective agreement covering hotels and restaurants, for example, includes an example of this kind of policy. It stipulates that all firms employing more than 35 workers should appoint and train a “trust” person to whom employees can take complaints.<sup>202</sup> In Japan, firms have created centres within their personnel divisions to deal with sexual harassment and made arrangements with external organizations to offer professional counselling.<sup>203</sup> Similarly, in Malaysia, a few of the companies which endorsed the Government’s Code of Practice have modified existing complaints procedures to ensure that counsellors are available to victims of sexual harassment;<sup>204</sup> while Fuji Xerox in Japan has employed outside counsellors, recognizing that it may be difficult for victims to report to the employee relations department.<sup>205</sup> It has also distributed a “Sexual Harassment Prevention Hot-Line Card”, which contains the phone numbers of its counselling office and provides examples of sexually harassing behaviour.

<sup>199</sup> op. cit., [http://hreoc.gov.au/sex\\_discrimination/code\\_practice/SH\\_codeofpractice.pdf](http://hreoc.gov.au/sex_discrimination/code_practice/SH_codeofpractice.pdf).

<sup>200</sup> Dietz, op. cit.

<sup>201</sup> ”Tackling harassment at Suffolk County Council”, op. cit.

<sup>202</sup> *European Industrial Relations Report*, No. 289, 1998, p. 15.

<sup>203</sup> “Measures to prevent sexual harassment in the workplace”, op. cit., p. 3.

<sup>204</sup> Zaitun, op. cit., p. 41.

<sup>205</sup> Yamakawa, op. cit., pp. 17-18.



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The role of the confidential counsellor can allow employee representatives to play a part in ensuring a harassment-free working environment. In Japan, Zensen Domei, a federation of trade unions in the garment, food, services and retail sectors, reached an agreement with employers to establish counselling offices jointly run by union members and management.<sup>206</sup> The collective agreement at Zanussi in Italy provides for two confidential counsellors to be appointed, one from the trade union and one from management.<sup>207</sup> The Zanussi agreement is also of note, in that it provides that the parties must designate a confidential counsellor to deal with incidents of harassment of male employees. Similar “gender-balance provisions” are included in other policies. Some organizations have, in addition, attempted to ensure that the counsellors reflect the make-up of the workforce in other ways. At Flinders University in Australia, the Equal Opportunity Unit has the responsibility of ensuring that their contact officers and conciliators are drawn from a broad range of occupations and fields of study.<sup>208</sup>

It is also important to ensure that advisers are independent of management, and have adequate powers and facilities to enable them to effectively perform their role.

## The investigation

Formal procedures usually require that management undertake a full investigation in response to complaints. The most common format is for interviews to be conducted with the complainant, the alleged harasser and any witnesses; a determination made as to whether the complaint has been substantiated; and a report compiled. The process culminates in a decision as to what disciplinary measures, if any, will be taken. The harasser and complainant are then informed of the outcome of the complaint, at which stage it may be possible to appeal against the decision. The investigator can be one of a range of candidates, depending on the policy, including representatives of the human resources department, affirmative action officers and confidential counsellors. In some countries, it is common to establish a grievance or complaints commission to investigate complaints, issue advice on appropriate disciplinary measures and, in some instances, enforce sanctions. In Denmark, for example, 29 per cent of enterprises having policies have set up grievance commissions to deal specifically with sexual harassment complaints; while in others, complaints are handled by the general grievance commissions.<sup>209</sup> In the Philippines, the sexual harassment legislation provides that a committee on decorum and investigation of cases on sexual harassment should be set up to investigate complaints;<sup>210</sup> while in India, the Supreme Court has required that sexual harassment committees be established in each workplace.<sup>211</sup> It appears that almost all government departments in India have set up this kind of committee, as have most major public sector organizations,<sup>212</sup> but that very few firms in the private and unorganized sectors have done so.

<sup>206</sup> *ibid.*, pp. 18-19.

<sup>207</sup> “Zanussi pioneers worker participation”, *op. cit.*

<sup>208</sup> *op. cit.*, [www.flinders.edu.au/ppmanual/EqualOpportunity/sexharass.html](http://www.flinders.edu.au/ppmanual/EqualOpportunity/sexharass.html).

<sup>209</sup> *ibid.*, p. 38.

<sup>210</sup> Philippines: Anti-Sexual Harassment Act of 1995, Section 4(b).

<sup>211</sup> *Vishaka v. State of Rajasthan*, *op. cit.*

<sup>212</sup> The Lawyers Collective, *op. cit.*, Annex F.

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There are signs of concern in some organizations that grievance commissions should include worker representatives. In Canada, for example, provisions in collective agreements provide that sexual harassment complaints will be jointly investigated by employer and worker representatives, termed a Joint Sexual Harassment Investigation.<sup>213</sup> At Jawaharlal Nehru University in India, it was felt that the sexual harassment committee should include employee representatives and union members in addition to students and teachers.<sup>214</sup> In the Philippines, although the legislation requires that committees include at least one union representative and a representative of both supervisory and non-supervisory employees,<sup>215</sup> a recent survey found that this level of worker representation is not being realized.<sup>216</sup> A further concern is that complaints committees should include women. The guidelines for workplace policies issued by the Supreme Court of India, for example, require that the chairperson and at least half of the members of sexual harassment complaints committees be women and that they include one NGO participant, although it appears that these requirements are not always being fulfilled in practice.<sup>217</sup>

Time limits, confidentiality, due process rights, and preventing victimization are all frequently identified as essential to the investigation of a harassment complaint. Emphasis is placed on the investigation being resolved promptly for the benefit of both the complainant and the alleged harasser. For instance, the EU Code of Practice suggests that procedures set a time limit within which complaints will be processed, with due regard to the time limits in national legislation for initiating a legal complaint. In Australia, the HREOC Code of Practice recommends that timelines be guaranteed. Many policies designate a period within which the process should be initiated or completed. In Malaysia, some companies have specified a timeframe within which management must respond to complaints. In one, a period of three days has been specified, in contrast to the seven- to 14-day limit which it extends to other kinds of complaints.<sup>218</sup> The policy of Katz Media in the United States recognizes, however, that prompt reporting cannot always be expected, since the individual concerned may be reluctant to come forward and take time to decide to do so. The policy notes:

[D]ue to the sensitivity of these problems and because of the emotional toll such misconduct may have on the individual, no limited timeframe will be instated for reporting sexual harassment complaints. Late reporting of a complaint will not in and of itself preclude this Company from taking remedial action.<sup>219</sup>

Confidentiality as well is often considered a vital component of a sexual harassment complaints procedure, given the nature of many complaints and the effect publicity may have on both victims and wrongfully accused harassers. In China, the Reebok policy states that procedures must be introduced to ensure that staff can make confidential

<sup>213</sup> See A.P. Aggarwal: "Dispute resolution processes for sexual harassment complaints", in *Canadian Labour and Employment Law Journal*, Vol. 3, 1995, p. 91.

<sup>214</sup> The Lawyers Collective, op. cit., Annex. F.

<sup>215</sup> Anti-Sexual Harassment Act, Section 4.

<sup>216</sup> Ursua, op. cit., ECOP survey cited on p. 17.

<sup>217</sup> The Lawyers Collective, op. cit., pp. 28-29.

<sup>218</sup> Zaitun, op. cit., p. 41.

<sup>219</sup> Reinhart, op. cit.

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complaints.<sup>220</sup> Policies attempt to ensure confidentiality by requiring that separate locked files be kept for investigation records, requesting that all involved in the process refrain from divulging the details of the complaint, and warning that violations of the confidentiality policy will be taken seriously and addressed through the employer's disciplinary policy.

A range of other procedural rights are also protected by many workplace mechanisms. The policy of Flinders University in Australia contains a list of principles for the conduct of informal and formal complaints, including that the tenets of procedural fairness will apply at all stages of the complaint resolution process; that conciliators and others responsible for investigating and resolving the matter will act fairly and impartially; and that each party will be informed of the case being made against him or her.<sup>221</sup> Many policies provide that both parties may be represented at or accompanied to both informal and formal meetings. At the University of Victoria in Canada, parties to a complaint process can be accompanied by a friend or advocate, including a lawyer or legal advisor, at all stages in the process.<sup>222</sup> Protecting the rights of the alleged harasser is also considered important. The EU Code of Practice states that the alleged harasser should be given full details of the nature of the complaint, and the opportunity to respond to it. There is also a concern that proceedings be conducted in languages which all participants, particularly the complainant and alleged harasser, can understand. In Australia, the HREOC Code of Practice suggests that policies should be translated into appropriate community languages.

Finally, to preserve the smooth functioning of the entire complaints process, many policies state that the organization will not tolerate the victimization of the complainant, the alleged harasser or anyone else involved in the complaint. Even members of investigative bodies can be victimized, particularly where they do not receive wholehearted employer support. In the Philippines, where the law is silent on protection from victimization, it has been found that fear of reprisal, particularly of the loss of employment, is a primary factor in the decision to withhold or withdraw a sexual harassment complaint.<sup>223</sup> In order to counter all forms of retaliation, many policies state that the organization will not tolerate the victimization of the complainant, the alleged harasser or anyone else involved in the complaint process.

## ***Sanctions and disciplinary measures***

Effective sexual harassment policies require that suitably deterrent sanctions should be in place, and that an incident of sexual harassment should not be treated as a trivial offence or dismissed as the exercise of poor judgement by the perpetrator.<sup>224</sup> The penalties which can be applied range from verbal and written warnings or an adverse performance evaluation, to suspension, transfer or demotion and ultimately to dismissal. Enterprise policies tend to make a range of measures available, usually by stating that the sanction will depend on the degree and extent of the harassment. It is a theme of many policies, however, to warn that the most extreme forms of harassment, including physical violence,

<sup>220</sup> Tang, *op. cit.*, paragraph 46.

<sup>221</sup> Reproduced in Ruskin and Sutherland, *op. cit.*, Appendix 4.

<sup>222</sup> The Human Rights Office, University of Victoria: *Policy and procedures*, available at [web.uvic.ca/prdh/office-info/policy-index.htm](http://web.uvic.ca/prdh/office-info/policy-index.htm).

<sup>223</sup> Makalaya survey, cited in Ursua, *op. cit.*, Section III, point 6.

<sup>224</sup> Rubenstein, *op. cit.*, p. 18.

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will automatically result in dismissal. Also, it appears that in some organizations, traditional remedies are thought to be unwieldy, and innovative approaches have been developed. Under the Toronto Dominion Bank policy, the disciplinary measures may include the offender agreeing to hold a staff meeting of his branch or unit to explain the nature of the offence and why his conduct was unacceptable.<sup>225</sup> Another approach is to offer counselling or therapy to the harasser, as in the Volkswagen AG policy.<sup>226</sup> Where the harasser is not an employee of the company, the ability to apply disciplinary measures is obviously limited, but methods which can be used include sending letters of objection, discussing the behaviour and requesting that it stop, and refusing to continue to conduct business with the offending party.

A sensitive issue which can arise in relation to sexual harassment complaints is the question of how to address false allegations. Organizations seek to strike a balance between recognizing that particular types of conduct constituting sexual harassment can be difficult to determine, while appropriately addressing cases in which knowingly false allegations are made. Some policies include sanctions which can be deployed against those who make false accusations of sexual harassment; yet emphasizing these sanctions risks jeopardizing attempts to encourage complainants to report incidences of harassment. Katz Media's policy attempts to strike the necessary balance.<sup>227</sup> It first recognizes whether such conduct constitutes sexual harassment that "requires factual determination". It takes into account the position of the wrongfully accused, noting that false accusations can have "sour effects on innocent persons". The policy provides that if, after an investigation, it is clear that the complainant has "maliciously or recklessly made a false accusation", he or she will be subject to sanction, including possible dismissal. It continues by stating that the company will take appropriate action to restore the reputation of the accused, while reassuring potential complainants that no adverse job-related consequences will result from bringing good faith complaints, regardless of the outcome of the investigation.

It is important to note that the availability of sanctions, however wide-ranging and tailored to suit sexual harassment complaints, does not imply that they will always be effectively applied. A European Commission study reveals that, where a choice of sanctions is available, it is common for the least stringent to be selected.<sup>228</sup> The report found that most harassers are given either a formal or informal warning without further action.

## **Training**

Training is among the most important of the proactive measures which can be taken to ensure that the broad contours of a sexual harassment policy be effectively implemented in practice. Many organizations provide training in two stages: first, on the content of the policy; and then to ensure that it is effectively enforced and used. Training sessions can then be conducted at regular intervals to ensure awareness among the workforce and managers of what constitutes sexual harassment, their responsibilities, and the details of the grievance procedures, and to update them on any changes. Sessions may be directed at the entire workforce, or designed to fit the specific needs of employers, managers and individuals with specialized roles, such as confidential counsellors. Ultimately, individuals

<sup>225</sup> Sinclair, op. cit., p. 98.

<sup>226</sup> Reinhard, op. cit.

<sup>227</sup> *ibid.*, p. 24 (see box on page 54).

<sup>228</sup> European Commission, *Sexual harassment in European workplaces*, op. cit., p. 39.

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in the organization can be trained to conduct future sessions and workshops. Employers are currently making use of some or all of these training options. Some design training unilaterally. In others, however, the provision of training has enabled workers and their representatives to be actively involved. In Germany, for example, many firms have arranged training seminars in cooperation with their works councils.

The stage at which the training is conducted can be crucial. Many organizations have recognized the need to educate workers about sexual harassment as soon as possible, and have introduced training at an early stage, perhaps even during the recruitment process or in the first few weeks of employment. In China, for example, in a number of hotels in Tianjin, pre-post training has been offered to women workers, although it has tended to focus on proving the ability of women to protect themselves from harassment rather than on methods of preventing it.<sup>229</sup> Some policies require training to be included in induction programmes. In addition, some organizations have targeted training at groups in their workforces who are at a particular risk of being sexually harassed. Bell Canada, for instance, established a Qualifications Development Programme aimed at increasing the representation of women in trades, technology and operation jobs.<sup>230</sup> Management and unions have developed training specifically for women entering the programme and their supervisors, including a sexual harassment awareness workshop. Training programmes are also often devised specifically for individuals with a specialized role in the complaints procedure on the most appropriate ways of dealing with complaints.

Training on sexual harassment in the workplace can take a number of forms, depending on the stage at which it is introduced and the groups to whom it is addressed. Often, however, it is conducted by presenting examples of harassment in role-playing, allowing the participants the opportunity to discuss whether the behaviour they have witnessed constitutes sexual harassment and the most appropriate ways of responding to it. One of the most widely reported examples of this kind of training sessions is the workshop, “A matter of respect”, conducted at DuPont.<sup>231</sup> These sessions involve interactive video-based training in which the participants view scenarios and engage in a facilitated discussion. The American Social Security Administration, which employs workers across the United States, purchased sexual harassment awareness training software to provide training for all of its employees.<sup>232</sup> However, even where these relatively expensive methods of training provision are unavailable or inappropriate, the primary elements of training — defining sexual harassment, ensuring that those responsible for the implementation of the policy can recognize and address it, identifying the most effective ways of conducting investigations — can be included as elements of even the most basic training course.

## **Monitoring and evaluation**

The final element in designing an effective enterprise-level policy on workplace sexual harassment is to ensure that it is monitored and the results evaluated. Through these processes, the employer can assess whether the policy is being implemented effectively and put the lessons learned into practice. In some countries, the applicable legislation requires that a review process be conducted. The Swedish equal opportunities legislation,

<sup>229</sup> Tang, op. cit., paragraphs 30 and 51.

<sup>230</sup> Gallant, op. cit., pp. 79-80.

<sup>231</sup> Flynn, op. cit.

<sup>232</sup> J. Hasson: “Personal training”, in *Federal Computer Week*, Vol. 14, No. 3, 1999, p. 26.

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for example, obliges employers to produce annual progress reports on the equality measures being taken in their organizations, including on sexual harassment.<sup>233</sup> Some employers have developed their own processes of monitoring and evaluation. These include the use of techniques such as the analysis of questionnaires completed by employees, and the conducting of discussions with victims and individuals who administer the complaints procedure. Organizations conducting these kinds of processes can review their policies and procedures in light of their findings and also ensure they are in line with legal developments.

## Conclusion

Workplace policies and programmes on sexual harassment both reinforce legal prohibitions and play a powerful preventive role. Clearly they benefit workers who have been subjected to sexual harassment by allowing them to have their treatment recognized and stopped. They also allow employers to prevent sexual harassment, thus enabling them to avoid its effects on productivity and to contribute to the equitable treatment of their female employees. The number of employers who have introduced sexual harassment policies and complaints procedures appears to be increasing, particularly in industrialized countries, and there are signs of awareness of their significance in a number of countries in which there were previously few initiatives in this area. It is apparent, however, that many employers, even when required to do so by national laws, are failing to effectively address the problem of workplace sexual harassment. Among those who have introduced these policies, however, there appears to be an emerging consensus around what they should contain and the measures which should be taken to implement them, which can be drawn on by those employers who have yet to take action. This review of selected workplace sexual harassment measures from around the world highlights the primary elements of an effective sexual harassment policy: a strongly worded policy statement; a complaints procedure which is both effective and simple to use; and remedial measures which are powerful and tailored to the nature of the offence. In addition, training should be conducted frequently for all workers and targeted particularly at staff who play a specific role in the complaints procedure. Finally, sexual harassment complaints procedures should be monitored and regularly evaluated to ensure that they are functioning effectively.

<sup>233</sup> Equal Opportunities Act, Section 13.



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